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# REPORTS

OF

# CASES AT LAW AND IN EQUITY

DETERMINED BY THE

# SUPREME COURT

OF THE

# STATE OF IOWA.

MAY 26—OCTOBER 27, 1891.

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BY

NATHANIEL B. RAYMOND.

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VOL. III.

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# JUDGES OF THE SUPREME COURT

## DURING THE TIME OF THESE REPORTS.

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GIFFORD S. ROBINSON, STORM LAKE.
CHARLES T. GRANGER, WAUKON.
JOSIAH GIVEN, DES MOINES.
JAMES H. ROTHROCK, CEDAR RAPIDS.

---

## OFFICERS OF THE COURT.

JOHN Y. STONE, GLENWOOD, *Attorney General.*
GILBERT B. PRAY, WEBSTER CITY, *Clerk.*
NATHANIEL B. RAYMOND, DES MOINES, *Reporter.*

# JUDGES OF THE COURTS

## FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

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*Second District*—E. L. BURTON, Ottumwa; W. I. BABB, Mt. Pleasant; H. C. TRAVERSE, Bloomfield; W. D. TISDALE, Ottumwa.
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*Sixth District*—D. RYAN, Newton; J. KELLY JOHNSON, Oskaloosa; A. R. DEWEY, Washington.
*Seventh District*—C. M. WATERMAN, Davenport; W. F. BRANNAN, Muscatine; P. B. WOLFE, Clinton; A. J. HOUSE, Maquoketa.
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*Eleventh District*—D. R. HINDMAN, Boone; N. B. HYATT, Webster City; S. M. WEAVER, Iowa Falls.
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*Sixteenth District*—GEORGE W. PAINE, Carroll; C. D. GOLDSMITH, Sac City.
*Seventeenth District*—JOHN R. CALDWELL, Toledo.
*Eighteenth District*—J. H. PRESTON, Cedar Rapids; JAMES D. GIFFEN, Marion.

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## SUPERIOR COURTS.

*Cedar Rapids*—JOHN T. STONEMAN.
*Creston*—S. R. DAVIS.
*Council Bluffs*—J. E. F. MCGEE.
*Keokuk*—HENRY BANK, JR.

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OF

# CASES AT LAW AND IN EQUITY,

DETERMINED BY THE

# SUPREME COURT

OF

## THE STATE OF IOWA,

AT

## DES MOINES, MAY TERM, A. D. 1891,

IN THE FORTY-FIFTH YEAR OF THE STATE

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## HENRY KNAPP, Appellant, v. C. G. GREENWOOD *et al.*, Appellees.

**Mechanic's Lien:** OSTENSIBLE OWNER: CONSTRUCTION OF STATUTE: FORECLOSURE. One holding a power of attorney to buy and sell real-estate for another, and until the sale thereof to rent the same, or to occupy continuously himself, and to hold the same in all respects as if he was the absolute owner thereof, is an *owner* within the meaning of section 10, chapter 100, of the Laws of the Sixteenth General Assembly; and where such a person purchased a town lot, and took a deed in the name of his principal, but such deed was not recorded, and material was sold to the agent for the construction of a house thereon, under the representation that he was building the same to occupy himself, and he did afterwards so occupy it, and was supposed by the furnisher of the material to be the owner, *held*, that the party supplying said materials was entitled to a mechanic's lien therefor, and to have the same foreclosed against said property as against the actual owner thereof.

*Appeal from Mills District Court.*—HON. GEORGE CARSON, Judge.

TUESDAY, MAY 26, 1891.

ACTION to quiet title to certain real estate. There was a decree for the defendants, and the plaintiff appeals.—*Affirmed.*

*H. C. Watkins*, for appellant.

*E. B. Woodruff* and *L. W. Ross*, for appellees.

GRANGER, J.—The issues involve the title to lot 12, block 19, in the town of Silver City, Mills county, Iowa. On the twenty-eighth day of July, 1885, the defendant Terrell, then sheriff of Mills county, made to the defendant, James A. Frazier, a deed of said premises, which was the result of a sale in pursuance of a foreclosure judgment of a mechanic's lien in a suit in which the defendant, C. G. Greenwood, was plaintiff, and I. H. Bouton was defendant.

The mechanic's lien (foreclosed) was for lumber sold by Greenwood to Bouton and used in the erection of a house on the lot in question. The plaintiff Knapp was, and is, a resident of Cayuga county, New York. I. H. Bouton was his agent, holding a written power of attorney to buy and sell for him real estate in Iowa. In pursuance of such authority in May, 1881, Bouton purchased of one Wing lots 10, 11 and 12, the latter being the lot in question, and Wing made a deed thereof to Knapp, which he, Wing, was permitted to retain as security for an unpaid balance of the purchase money of twenty-five dollars, which was paid, and the deed surrendered in the winter of 1884–1885 to L. Bouton, son of I. H. Bouton. The latter placed the deed in the recorder's office, without payment of the fee for recording, and it remained without record until July, 1886, when I. H. Bouton paid the fee, and it was recorded.

After the purchase of the lots in May, 1881, I. H. Bouton bought of Greenwood the lumber used in con-

structing the house. Greenwood then understood that Bouton owned the lots, and Bouton said he was building the house to occupy himself; he was moving in from the country, and was going to practice law. The building was erected, and I. H. Bouton moved into and occupied it until he left the state, and went to Cayuga county, New York. This power of attorney (omitting unimportant parts) is as follows:

"*Know All Men by These Presents:* That I, Henry Knapp, unmarried, of Cayuga county, state of New York, have made, constituted and appointed and by these presents do make, constitute and appoint, Isaac H. Bouton, of Mills county, state of Iowa, my true and lawful attorney for me, and in my name, place and stead, to enter into and take possession of all such lands, tenements, hereditaments, or real estate whatsoever in Mills county, state of Iowa, to or which I am or may be in any way entitled or interested, and to grant, bargain and sell the same, or any part or parcel thereof for such sum or price, and on such terms as to him shall seem meet, and for me and my name to make, execute, acknowledge and deliver good and sufficient deeds and conveyances for the same, either with or without covenants of warranty; *and until the sale thereof to let and demise the said real estate for the best rent that can be procured for the same, or to occupy continuously himself and to hold the same in all respects as if he was the absolute owner of the same.* He shall also have power to purchase additional lands for me, and to execute mortgages in my name for me, and to collect, recover and receive all sums of money which shall become due and owing to me by means of such bargain or sale, or lease and demise. Giving and granting to the said Isaac H. Bouton, my said attorney in fact, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully,

to all intents and purposes, as I might or could do, if personally present."

The erection of the building on the lot was at the time known to the plaintiff by notice from Bouton. The plaintiff seeks to avoid the foreclosure judgment, and the sale made in pursuance thereof, on the ground that he was not a party to the proceeding and that he is not bound by the acts and conduct of I. H. Bouton.

We think a few facts practically conceded lead to a correct disposition of this case. Having in view the facts, that by the power of attorney the plaintiff gave to Bouton the right in regard to the real estate "to rent the same, or to occupy continuously himself, and to hold the same in all respects as if he was the owner of the same;" and then giving and granting to "him * * * full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present;" and, also, that the plaintiff knew that Bouton had erected the building, and was using the same, we are brought to the point to consider the particular facts urged against the validity of the judgment and sale. The plaintiff was not a party to the foreclosure proceeding. That proceeding was on the theory and supposition that Bouton was the owner of the lot. He had been residing in the country, was moving into town, and under the undisputed evidence constructed the building for his own immediate use, and there is no pretense in the record that such use was not authorized by the plaintiff. The plaintiff's deed had been kept from the record, and Bouton, being in possession, was the ostensible owner, and the material was furnished under a belief that he was the *actual* owner. It is beyond dispute that the building was made for the immediate use of Bouton, though perhaps ulti-

mately for the plaintiff. Under that state of facts Bouton was, for the purpose of a mechanic's lien thereon, the owner. By section 10, chapter 100, Laws of the Sixteenth General Assembly, it is provided: "Every person for whose immediate use or benefit any building, erection or other improvement is made * * * shall be included in the word 'owner' thereof." Code, section 2130, gives the lien by virtue of a contract with the "owner" of the land. It will thus be seen that "owner" is not of necessity one who has a legal or equitable title, but one for whose immediate use or benefit the improvement is made. Bouton comes clearly within this provision of the statute, and the case exemplifies the wisdom of the law, as without it Greenwood would have been denied his lien, for by the transaction between the plaintiff and Bouton the actual ownership was unknown. See *Estabrook v. Riley*, 81 Iowa, 479. The foreclosure judgment was small, and it is to be regretted that property of much greater value should be sacrificed in payment. But this does not seem to have been the fault of the defendants.

Both Knapp and Bouton, at the commencement of the foreclosure suit, were in New York, and the service was by publication, and it is said that Bouton had no actual knowledge of its pendency. That fact would not defeat the judgment. The judgment was by default, and the law fixes the time and terms of opening such a case for retrial. There is reason to believe there was not as much anxiety to investigate the merits of the foreclosure suit, as there is to avoid the judgment by this kind of a proceeding. The record shows that after the expiration of the period of redemption the defendant Frazier was willing to permit redemption, which was refused or neglected.

There are no controlling equities on behalf of the plaintiff. The judgment below is AFFIRMED.

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# THE CONSOLIDATED TANK-LINE COMPANY, Appellant, v. W. H. HUNT, Appellee.

**Property Exempt from Execution:** CONSTRUCTION OF STATUTE: TEAM: LABORER. One who is the head of a family, and who is engaged in the sale of oils at retail from a tank wagon, which is sometimes driven by himself, and sometimes by his minor son, and who also makes sales from a storeroom where his oils are stored, but who makes the greater part of his sales from the wagon, and earns his living thereby, is a laborer, who habitually earns his living by the use of a team and wagon, within the meaning of section 3072 of the Code, and is entitled to hold such team and wagon exempt from execution.

*Appeal from Page District Court.*—HON. H. E. DEEMER, Judge.

TUESDAY, MAY 26, 1891.

APPELLANT brought an action to recover for oils sold to the defendant, and obtained an attachment which was levied on a team, harness and oil wagon. The defendant moved the court to discharge the attached property, and assigned as reasons therefor the following: "The said team and harness and oil wagon is the only one owned by the defendant; that defendant is a married man, and the head of a family, and resided in Clarinda, Page county, Iowa; that said team, harness and wagon is the only one owned by defendant, and the only one by which defendant habitually earns a living for his family. It is, therefore, exempt under the law, as is more fully shown by affidavits hereto attached marked 'A' and 'B' and made a part hereof." Affidavits were filed in support of, and against, the motion, upon a consideration of which the court below sustained the motion, and from that order the plaintiff appeals.—*Affirmed.*

*W. W. Morsman*, for appellant.

*Clark & Hill* and *J. R. Good*, for appellee.

GRANGER, J.—The testimony gives support to the following facts: That the defendent is a resident of Page county, Iowa, a married man, and the head of a family; that prior to March, 1889, he was engaged in selling oils and gasoline at Clarinda, Iowa; that after that he was engaged in a retail trade of those articles, having a place of business known as headquarters in the back room of a building on the north side of the square in Clarinda; from these "headquarters" for a time he delivered his sales in an ordinary wagon, and afterwards from the wagon in suit, known as a "tank wagon." The wholesale trade was discontinued June 27, 1889, for which trade his oils had been stored near the depot. After the discontinuance of the wholesale trade, his oils for the retail trade were stored at, and delivered from, the "headquarters." A few sales were made, including the delivery, at the headquarters; but the general business was carried on by orders being left at headquarters to be filled about the city from the tank wagon, and in some cases cans would be set out by the customers, and these were also filled from the wagon. At times the oils would be paid for at headquarters, but generally at the place of delivery. The team for the purpose of delivering the oils was sometimes driven by the defendant in person, and sometimes by his minor son, sixteen years of age. At times both were with the team. The evidence favors the view that most of the time the son was with the team, and delivered the oils, but performed such service for his father.

The oils were received at headquarters in quantities of from three to five barrels at a time. The team, harness and wagon were used by the defendant in this

business, and the business is the defendant's means of earning a living. The appellant insists that the facts do not sustain the action of the court. His counsel states his view of the law in these words: "In my judgment the right has been clearly defined by statute, and under the statute, in order to maintain the exemption, the debtor must show that he is a *teamster* or other *laborer*, who by his personal *use* of the property *habitually* earns his living."

The statute to be construed is as follows: "If the debtor is a resident of this state, and is the head of a family, he may hold exempt from execution the following property: * * * the horse or team * * * the wagon or other vehicle, with a proper harness or tackle, by the use of which the debtor, if a physician, public officer, farmer, teamster or other laborer, habitually earns his living." It is conceded on authority that the statute is to receive a liberal construction. It would be a grave disregard of the concession were we to hold to the view, claimed by the appellant, that because the team was driven by the son, though for the father, the debtor, he is not within the provisions of the law as to exemptions. Let us suppose one who is a laborer or teamster and earns his living by the personal use of his team is disabled, we will say, totally, and a minor son, by the use of a team, supports the family. Will it be said that the owner, if a debtor, loses his right of exemption? Confining ourselves to the literal definition of the word "laborer" or "teamster" as quoted in argument, such a result might follow. But, looking to the law, and the purposes of its enactment, there is no difficulty in saying that such a case is clearly within its purview, and that the debtor would come within the statutory meaning of the word "teamster" or "laborer." If a widow, who is the head of a family, and also a debtor, owns a team, by the use of which her living is supplied, may she be divested of this

means of earning a living merely because she does not in person perform the labor of driving the team? These plain propositions pave the way to clearly observe the legislative purpose.

It is strenuously urged that the defendant is not a teamster nor laborer, but a merchant, and, as such, is not entitled to the exemption. It is true the defendant is engaged in a small way in the sale of merchandise. He has a back room of a building, used more for storage than for any other purpose, which is a base of supplies for his delivery system or business, and the business is carried on mainly by the use of the team, and it is manifest that, without the use of the team, he has no business to supply a living; for he says that the profits of completed sales at the headquarters would not pay his rent. Any person thus engaged in receiving and distributing oils must be said to be a laborer. He "is one who labors in a toilsome occupation." The use of the team is necessary to carry on the occupation, and, hence, if the occupation supplies his living, he earns his living by the use of his team. That the living is not wholly so earned is not material. The same exemption, upon the same conditions, is made to the physician, public officer and farmer, in which cases, it will be readily understood that the use of the team would be but an aid to the profession or calling. If a physician may have the exemption as an aid to the business of his profession by which he obtains a living, why may not the laborer, one who chops the wood in the forest, or quarries the rock from the hillside, to be put by the use of a team on the market, to supply his living, have the same protection? The fact that the laborer utilizes his efforts in the way of an independent rather than a dependent business should not operate to his disadvantage. This is the situation of the defendant. If he employed another to do the work of receiving the oils, replenishing the tank and delivering

about the city, the employe would without question be a laborer. The defendant is not less so merely because he directs and owns the business, besides performing the labor.

The district court must have found from the evidence that the defendant was within the statutory meaning a teamster or laborer, and that finding is conclusive upon us, unless the record affirmatively shows the court in error, and we do not think it does. The case of *Root v. Gay*, 64 Iowa, 399, supports our conclusion. AFFIRMED.

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## PERRY JOHNSON, Appellant, v. ZELI GRIMMINGER, Appellee.

**Intoxicating Liquors**: SALE TO MINOR: DAMAGES: LIEN UPON REAL ESTATE: KNOWLEDGE OF AGENT. Where a lessee of real estate used the same for a saloon, which was open and notorious, and of so disorderly a character as to attract ruffians, and a stabbing affray occurring therein was published in two daily papers of the town, and the husband of the owner of the premises collected the rents, and looked after the property for her, *held*, that the owner was chargeable with notice of the sale of intoxicating liquors upon said premises contrary to law, and that the plaintiff, having recovered a judgment against the saloon keeper on account of the unlawful sale of liquors to a minor upon said premises, was entitled to have the same established as a lien upon said real estate.

*Appeal from Keokuk Superior Court.*—HON. HENRY BANK, JR., Judge.

TUESDAY, MAY 26, 1891.

ACTION in chancery to enforce a judgment recovered by the plaintiff against one Clary, for selling intoxicating liquors to the plaintiff's minor son, and to declare it a lien against the real estate occupied by Clary as a saloon, when he sold the intoxicating

liquors to the minor. Upon a trial on the merits, the plaintiff's petition was dismissed.—*Reversed*.

*J. F. Smith*, for appellant.

*D. F. Miller, Sr.*, for appellee.

BECK, C. J.—I. The petition alleges the recovery of the judgment, and the occupancy of the real estate by the saloon keeper when the liquors were sold, and the knowledge, on the part of the defendant, of the sale of intoxicating liquors on the premises contrary to law. The answer denies the allegations of the petition, and alleges that the defendant sold the real estate after the judgment sought to be enforced in this case was rendered. The defendant presents a cross-claim, based upon the allegations that the suit is brought with malice, and without probable cause.

II. The action is triable in this court *de novo*. There is no question as to the facts of the recovery of a judgment against Clary, and that he occupied the real estate sought to be subjected to the judgment when the liquors were sold to the minor. The point of dispute is the knowledge of the defendant herein of the use of the property for the illegal sale of the intoxicating liquors.

III. In our opinion the evidence is ample to establish the defendant's knowledge so as to charge his property with the judgment recovered by the plaintiff. The saloon was open and notorious, and so disorderly as to attract ruffians. An affray resulting in the stabbing of one of the rowdies engaged in it was noticed in two daily papers, and the particulars stated, and the name of the owner of the saloon, and its number was given. The defendant lived in the city, and, we infer, not far from the saloon. Her husband collected rent for her, and looked after the property. He without doubt knew all about the character of the saloon, and that

intoxicating liquors were unlawfully sold in it. It is true he testifies he was not his wife's agent. He declares in his evidence, "I wasn't her (plaintiff) agent. I was her husband, and I go and do anything for her." He signed his name to a receipt for rent, and looked after the property. The defendant never denied her husband's authority as agent, and does not deny it in her evidence. His denial of his agency is rather of the legal conclusion than of the fact. He admits the service rendered for his wife in connection with the property, and declares that they were rendered not as an agent, but as a husband. He may possibly be ignorant of the fact that a husband may be a wife's agent, and, when he acts as such with her consent, she will be liable therefor, and chargeable with notice which he had of matters pertaining to the subject of his agency. There is no evidence supporting the defendant's cross-demand. In our opinion, the court below ought to have granted the relief prayed for by the plaintiff.

The decree dismissing the plaintiff's petition is reversed, and the cause is remanded for a decree in accord with this opinion, or at the plaintiff's option such a decree may be entered here. REVERSED.

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JOY, WRIGHT & HUDSON, Trustees, Appellees, v. THE SECURITY FIRE INSURANCE COMPANY, Appellant.

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1. **Fire Insurance**: LOSS: VALUE OF PROPERTY: BURDEN OF PROOF. The provisions of section 3, chapter 211, Acts of the Eighteenth General Assembly, that in any action upon a policy of insurance for the loss of any building insured "the amount stated in the policy shall be received as *prima facie* evidence of the insurable value of the property at the date of the policy," have no application to cases of the loss of personal property.

2. ———: ———: ———. In an action upon an insurance policy to recover for the loss of personal property insured, proof of the price at which the owner offered to sell the property within two weeks preceding the fire is competent on behalf of the defendant as tending to show the market value of the property destroyed.

*Appeal from Woodbury District Court.*—HON. C. H. LEWIS, Judge.

WEDNESDAY, MAY 27, 1891.

THE plaintiffs are trustees of John Hahne for certain of his creditors. The defendant company issued to John Hahne its policy of insurance against loss on certain classes of property, consisting of household goods and other articles of personal property in a certain building in Sioux City. The property was in part destroyed by fire on the ninth day of February, 1885, and the policy was assigned to the plaintiffs. This action is to recover thereon. The cause was tried to a jury that returned a verdict for the plaintiffs, and from a judgment thereon the defendant appeals. *Reversed.*

*R. W. Barger*, for appellant.

*Joy, Hudson, Call & Joy* and *C. L. Wright*, for appellees.

GRANGER, J.—I. Assignments based on the action of the court in excluding evidence make it important that we determine a question as to the burden of proof. The appellees contend that under the statutory provision the amount stated in the policy is *prima facie* the amount of the loss. The verdict in this case is for the amount stated in the policy, eleven hundred and seventy-three dollars. The statute on which the claim is based is chapter 211, Acts of the Eighteenth General Assembly, section 3, which provides:

1. FIRE insurance: loss: value of property: burden of proof.

"In any suit or action brought in any court in this state on any policy of insurance against the company or association issuing the policy sued on in case of the loss

of any building so insured, the amount stated in the policy shall be received as *prima facie* evidence of the insurable value of the property at the date of the policy: provided, nothing herein shall be construed to prevent the insurance company or association from showing the actual value at the date of the policy and any depreciation in the value thereof before the loss occurred: provided, further, such insurance company or association shall be liable for the actual value of the property insured at the date of the loss, unless such value exceeds the amount stated in the policy; and in order to maintain his action on the policy it shall only be necessary for the assured to prove the loss of the building insured, and that he has given the company or association notice in writing of such loss, accompanied by an affidavit stating the facts as to how the loss occurred."

The language of the section precludes a belief that the intention was that the policy should be *prima facie* evidence of the value of the personal property destroyed by fire for at least two reasons: *First*, because the section does not in terms so provide; and, *second*, that no reasons exist for giving to a doubtful statute such a construction. Looking to the section and the parts thereof where the policy has a *prima facie* effect, and we see, first, that it is as to the insurable value of the property, and it says: "In case of loss of any building so insured the amount stated in the policy shall be received as *prima facie* evidence of the insurable value of the property at the date of the policy." Then, again, speaking of the liability of the company for the actual value at the time of loss, and what the plaintiff must prove, having by the policy shown the insurable value, he must "prove the loss of the building insured." No other language in the section indicates a *prima facie* effect of the policy; and it seems to us quite conclusive that it was not designed to have that effect in cases of

loss of personal property, but of buildings, as expressed in the section. In most cases of loss of personal property insured the difficulty of the companies assuming the burden of showing the actual value at the time of loss would be great, if not impossible. Take insurance upon stocks of goods, from which sales are continually made, and additions made thereto; insurance upon hay and grain, the value and quantity of which changes rapidly from use, sales and other causes; and in fact, personal property quite generally, and it will be readily seen that such a rule would be attended with too great difficulties to believe, in the absence of language quite unmistakable, that the legislature so intended.

II. The policy contains this provision: "Fraud, false swearing, misrepresentation or any concealment of or omission to make known a material fact on the part of the assured, whether in applying for this insurance, or in the proofs of loss, or otherwise, shall render this policy and any renewal thereof void." Several defenses are pleaded to the cause of action, and, among them, that Hahne, in his proofs of loss, falsely and fraudulently misrepresented the value of the property insured; the defendant averring that the actual value of the property was but four hundred dollars, while in the proofs of loss it is represented as of the actual cash value of eighteen hundred dollars. The averments also put in issue the value of the property as affecting the amount of recovery on the policy. John Kauffman was a witness for the defendant, and testified that about two weeks before the fire he had a talk with Hahne about buying the property. He was then asked this question: "Now you may state whether or not he made you an offer to sell you that property at that time,—two weeks before the fire,—and what the offer was." After giving testimony as to certain articles, he was again asked: "What did Mr. Hahne ask you for

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that hotel furniture and building, and all contents of the hotel as it stood there?" The witness also testified that he was present at Mr. Lutz's office when one : was trying to buy the property of Hahne, and owing questions were asked: "Do you know r. Hahne offered to take for the hotel furniture, and beds, table-ware, and all that sort of Did Mr. Hahne tell Mr. Rossuck what the was worth at that time? *A.* Yes, sir. *Q.* at it was."

swers to these questions were excluded on objec- the plaintiff on the ground that they were petent, immaterial and no measure of damages." k the court erred in sustaining the objections. pellees' contention as to this point is: "It is t a man sells his property for, what prices may ated by pressing circumstances or illness, or her reasons. His offer can no more be used him than it can be used for him if he had had price tendered him." The property in ques- sisted of old or second-hand furniture, the price of which it is usually very difficult to . It cannot be said to have a fixed market nd we think that the price for which it was by the owner is at least competent evidence to dered by the jury. If such an offer is accepted, l seem quite conclusive that the property was ne amount of the offer. If not accepted, it e evidence tending to show that the property worth more than that for which it was offered. to be assumed in the absence of proof that the s "dictated by pressing circumstances," or for asons that might render the proof of such an no avail; but, if such "circumstances" exist, y be shown, and thus give to the testimony the o which it is entitled. 2 Wood on Insurance, *Hersey v. Insurance Co.*, 27 N. H. 149. Other

testimony of a like import was also refused, which we need not separately notice.

We do not think it necessary to consider other assignments, and the judgment is REVERSED.

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DENNIS WAGGONER *et al.*, Appellees, v. JEROME MANN *et al.*, Appellants.

1. **Tax Title**: FRAUD OF AGENT: LIMITATION OF ACTIONS. Where an agent, having money of his principal in his hands for the payment of taxes upon lands which were the subject of his agency, permitted the same to be sold for taxes, and afterwards took an assignment of the certificate of sale, and in due course of time received a tax deed thereto, *held*, that the fraud of the agent was not such as would arrest the running of the statute of limitations, and that an action commenced more than five years after the execution of the tax deed was barred under the provisions of section 902 of the Code.

2. ———: SALE TO COUNTY OFFICER: VALIDITY. A sale of lands for taxes to the clerk of the board of supervisors for the benefit of the county is not void under the provisions of section 775 of the Revision of 1860.

*Appeal from Jackson District Court.*—HON. ANDREW HOWAT, Judge.

WEDNESDAY, MAY 27, 1891.

ACTION in chancery to quiet the title of certain lands in the plaintiff. There was a decree granting the relief prayed for in the petition, from which the defendants appeal.—*Affirmed.*

*Peck & House* and *D. A. Wynkoop*, for appellants.

*Ellis & McCoy*, *William Graham* and *W. C. Gregory*, for appellees.

BECK, C. J.—I. Under the pleadings, original and amended, which need not be set out or recited, the

1. TAX title: fraud of agent: limitation of actions.

plaintiffs claim title to the land under tax deeds and a sheriff's deed. Defendants claim as heirs of Richard Mann, who died in 1855. He held the fee-simple title to the land, and devised a life-estate therein to his wife, Eliza Mann, who, in 1858 or 1859, intermarried with one Spicer, and removed from the state, and never afterwards returned. It is alleged in the defendants' answer and cross-bill that she died in 1881. We discover no evidence showing the date of her death, further than that a witness for the defendant testifies that he first heard of it in 1883 or 1884. January 3, 1865, a treasurer's tax deed for the land was executed to John Van Horn, and recorded on the same day. It is executed under and pursuant to a tax sale made December 2, 1861, to "F. Scarborough, for Jackson county." The deed recites that the certificate of sale was assigned by "F. Scarborough, clerk of the board of supervisors," to Booth and Graham, November 3, 1863, who soon after assigned it to Van Horn. The lands consisted of a quarter and an eighth of a section in different sections not contiguous. The tax deed does not show that the land was sold in separate parcels, nor the separate price for which each was sold. Three other tax deeds for parts of the land were subsequently executed upon tax sales had after the sale upon the tax deed first referred to was executed. These sales and deeds need be no more particularly referred to, as we find the consideration thereof is not necessary in order to decide the case.

In 1860 one Sanford brought an action in attachment against Eliza Spicer, to whom a life-estate in the lands had been devised as above recited, and caused her interest to be levied upon. A judgment was recovered in the action, and the lands were sold in 1860 to William Graham, who assigned the sheriff's certificate to Van Horn, and a sheriff's deed was made to him for the land, June 5, 1865. Van Horn conveyed the land

warranty, dated October 2, 1865, and filed the same month, to Isabel, who by deed of executed in 1868, conveyed the land to John Dennis Waggoner, the plaintiff. Bash is dianship, and is represented in the case by lian, Manderschied. The defendants make wer a cross-bill, and pray that the treasurer's s be declared void, or to have been executed for and benefit of defendants, upon grounds which stated hereafter; that the plaintiffs be required unt to the defendants for the rents and profits land; that their title be quieted, and that they lowed such other and further relief as equity ires. They allege that Van Horn was Mrs. Spicer's t, and had abundance of money in his hands to the taxes for which the land was sold, and it was duty to pay them; and that the tax sales and deeds e, therefore, fraudulent and void. Other grounds objection to the tax sales and deeds last made are ated, but, as we leave these sales and deeds out of the iew we take of the case, these objections need not be iscussed. In addition to the objection just stated as being urged against all of the tax sales and deeds, the defendants insist that the one first made is fraudulent, illegal and invalid, for the reason that the land was bid in by the clerk of the board of supervisors for the county; that the clerk was forbidden to purchase land at tax sales; and the county cannot acquire a tax title. It is also alleged that Van Horn had an ample amount of money received on account of Mrs. Spicer in his hands when he bought the sheriff's certificate of the sale of the lands on the Sanford judgment, which he should have used in payment of the judgment, and that his purchase, therefore, was fraudulent. It is shown that the only title acquired by Van Horn upon that sale was the life-estate of Mrs. Spicer. By an amendment to the cross-bill the defendants allege she died in 1884.

Defendants allege in this cross-bill that the plaintiffs had actual notice of the infirmities and frauds shown against the plaintiffs' title. The plaintiffs in their answer to the cross-bill deny the allegations of fraud, and of other matters pleaded against the validity of their title, and plead the limitations of Code, section 902, providing that no action for the recovery of real estate sold for the non-payment of taxes shall be maintained, unless it be brought within five years after the treasurer's deed was executed and recorded.

II. The title and interest acquired by Van Horn, through his purchase at the sheriff's sale under the Sanford judgment, was of a life-estate, and nothing more. The life-measuring duration of that estate has ended, and the remainderman or the reversioner takes the estate, and now holds it as though there had been no life-estate, which now cuts no figure in the case, further than as constituting a support for the allegations of fraud committed by Van Horn in failing to pay the taxes, and in acquiring a tax title while he had the life-estate. But these charges of fraud can only be made as to the last of those tax deeds and sales. The first was made before he purchased the sheriff's certificate of sale of the land. The effect of the fraud upon the tax title under the first deed we shall presently consider. We shall have no occasion to further consider the life-estate at one time held in the land.

III. We come now to the consideration of the decisive point in the case, which involves the tax title acquired by Van Horn under the tax sale of 1861. The sale and deed are regular, and it is not claimed that there was no assessment and levy of the taxes, or that the taxes had been paid. The proceedings leading to the sale, the sale itself, and the deed are not complained of; but it is alleged that the sale and deed are void because of the fraud of Van Horn in suffering the land to go to sale while he was Mrs. Spicer's agent, and had

her money in his hands sufficient to pay the taxes, and because of the purchase of the land by the clerk of the board of supervisors for the county.

IV. We shall now consider the effect of the alleged fraud in the acquisition of the tax titles. Under the prior rulings of this court, the statute of limitations provided by Code, section 902, is not arrested by reason of fraud of this character. If there is no sale, no notice of the expiration of the right to redeem, required by Code, section 894, no assessment or levy of the tax, or the tax has been paid, or for any other reason there existed no power or jurisdiction to sell the land for taxes, the sale is absolutely void, and a tax deed may be assailed on these grounds after the period of limitations prescribed by Code, section 902. *Case v. Albee*, 28 Iowa, 277; *Hillyer v. Farneman*, 65 Iowa, 227; *Wilson v. Russell*, 73 Iowa, 395; *Early v. Whittingham*, 43 Iowa, 162; *Nichols v. McGlathery*, 43 Iowa, 189; Code, sec. 897; *Patton v. Luther*, 47 Iowa, 236. But if the tax proceedings, assessment, levy and sale are irregular, voidable only, as in the case of sales of two or more tracts together for a gross sum, the failure to make entry of the delinquency of prior years and the like, or in any case there existed the jurisdiction or power to sell, which was irregularly or defectively exercised, the limitations of section 902 can be pleaded. *Thomas v. Stickle*, 32 Iowa, 71; *Peirce v. Weare*, 41 Iowa, 378; *Bullis v. Marsh*, 56 Iowa, 747; *Griffin v. Bruce*, 73 Iowa, 126; *Monk v. Corbin*, 58 Iowa, 503.

V. It may be assumed that the fraudulent acts complained of by the defendants in the cross-bill are established by the evidence that Van Horn was the agent of Mrs. Spicer, and did have her money in his hands at the time of the acquisition of the tax title sufficient to pay the taxes, and in other respects acted fraudulently, all of which was known to the plaintiffs. Code, section 897, declares that, if fraud of the pur-

chaser be established, "the sale and title shall be void." But the word "void," in this connection, has been construed by the court to mean "voidable;" and, therefore, the fraud of the purchaser will not take the case out of the operation of the limitations prescribed in Code, section 902. *Van Shaack v. Robbins*, 36 Iowa, 201; *Ellis v. Peck*, 45 Iowa, 142.

VI. It is insisted that the first tax sale and deed, which we hold supports the plaintiff's claim of title, are void, under Code, section 885 (Revision, sec. 775), which declares that sales of land for taxes to any county treasurer or auditor (clerk, under Revision, section 775, in force when the sale was made) "shall be void." The word, in the connection in which it is here used, has the same force and meaning given to it in *Van Shaack v. Robbins*, *supra*. This is so held in *Ellis v. Peck*, 45 Iowa, 112. See *Truesdell v. Green*, 57 Iowa, 215, applying *Ellis v. Peck*. *Henderson v. Oliver*, 28 Iowa, 20, cited by the defendants' counsel, does not hold that a sale forbidden by Code, section 885 (Revision, sec. 775), is absolutely void, but rather supports the views we have just stated. But, indeed, we are not prepared to hold that, under the statute just cited, a clerk or auditor of a county may not, for a proper purpose, not connected with his own interests, but to protect the interest of the county, purchase land at a tax sale. If the county, to protect a title to land, or to enforce a claim thereon, or for any other proper purpose, acquire a tax title to the land, undoubtedly it possesses the power and right to do so, through its clerk or other officer or trustee. See *Allen v. Cerro Gordo Co.*, 34 Iowa, 54; *Page Co. v. Emigrant Co.*, 41 Iowa, 115. The doctrines above stated, which are well established by the decisions of this court, lead to the conclusion that the defendants' action, assailing the validity of the tax sale and deed first acquired, and considered in this opinion, is barred

2. ——: sale to county officer: validity.

by the limitations prescribed by Code, section 902, and that the district court rightly dismissed the defendants' cross-bill, and granted the relief prayed for in the plaintiffs' petition.

The decree of the court below is, therefore, AFFIRMED.

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# F. WARNEBOLD, Appellee, v. THE GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN, Appellant.

1. **Mutual-Benefit Insurance:** CONTRACT: MEMBERSHIP IN TWO LODGES. The plaintiff's intestate was the holder of a certificate of membership in the Germania Lodge in the Ancient Order of United Workmen in which the plaintiff was named as the beneficiary. A division occurring in the order on account of some requirements of the supreme lodge, with which the then existing grand lodge and the above-named local lodge refused to comply, another local was organized at the intestate's place of residence, composed of members who adhered to the supreme lodge, and called the Evening Star Lodge, which became a member of the defendant grand lodge. The plaintiff's intestate united with the Evening Star Lodge, and subsequently he surrendered his certificate to the defendant, and a new certificate was issued to him. He also continued his membership, however, in the Germania Lodge, and after his death the plaintiff received from it the amount of insurance due on account of such membership. *Held*, that the deceased having made a new contract with the defendant lodge after the division in the order, the plaintiff's right of recovery thereunder was not affected by the payment made to her by the disloyal lodge.

2. ———: PAYMENT OF DUES: FORFEITURE: ESTOPPEL. The deceased had become delinquent in the payment of his dues to the Evening Star Lodge, but no action was taken by the lodge suspending him from membership, and before his death these dues were paid. After his death the loss was reported, and an assessment made to pay the same, in which he was stated to be entitled to all the benefits of the order. *Held*, that notwithstanding by the constitution of the order the deceased was suspended from membership upon his default in the payment of dues without any action being taken thereon, the defendant was estopped by its action from claiming that the deceased was not a member in good standing at the time of his death.

3. ———: LODGE RESOLUTION: NOTICE. After the deceased became a member of the local loyal lodge, but before the issue of the certificate in controversy, the defendant lodge passed a resolution providing that it would not pay the beneficiary of any member who was affiliating with or paying assessments or dues to the disloyal lodge, "unless such member shall sever all connection with such rebel grand lodge," etc. Notice of this resolution was served upon the deceased, but the resolution as set forth in the notice did not contain the clause above quoted, and the jury found specially that the deceased did not have knowledge of such provision at the time he surrendered his old certificate and received a new one from the defendant. *Held*, that the right of membership of the deceased was not forfeited by continuing his connection with the disloyal lodge.

4. ———: ———: ———: EVIDENCE. The defendant offered to show that a delegate from the Evening Star Lodge to the grand lodge at the time the above resolution was adopted made a verbal report of said resolution at a meeting of the former lodge. *Held*, that it appearing that the deceased was not present at such meeting the evidence was properly excluded.

5. ———: ———: ———: INSTRUCTIONS. The court instructed the jury that to make said resolution binding upon the deceased it must be found that he knew and believed that he was thereby precluded from any affiliation with the disloyal lodge. *Held*, that in view of the evidence relied upon to show such knowledge the instructions were not improper.

*Appeal from Scott District Court.*—HON. ANDREW HOWAT, Judge.

WEDNESDAY, MAY 27, 1891.

THE plaintiff is the widow of August Warnebold, deceased. She brought this suit to recover of the defendant the avails of a certain policy of insurance or benefit certificate issued by the defendant to her late husband on the twentieth day of November, 1886. Her said husband died on the twentieth day of August, 1887. The defendant claims that said benefit certificate is void, and that it was forfeited by reason of the failure of the said August Warnebold to comply with the rules, regulations and orders required of members of the said order. There was a trial by jury, and a

verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*Davison & Lane*, for appellant.

*Heinz & Hirschl*, for appellee.

ROTHROCK, J.—I. August Warnebold became a member of Germania Lodge Ancient Order of United Workmen, at Davenport, in 1878. He remained a member of said lodge in good standing until his death, and after his decease the plaintiff herein received the sum of two thousand dollars, the life insurance due to the beneficiary by reason of said membership. In the year 1882 the grand lodge of said order in this state refused to comply with certain requirements of an organization called the supreme lodge, and by reason of said refusal there was a schism or division of the order in this state. The members who refused to obey the requirements of the supreme lodge, and those who were in favor of obeying its mandates, became separate bodies or organizations. Since that time there have been two grand lodges in Iowa, and each of them is sustained by separate local lodges. Germania Lodge indorsed the action of the grand lodge in refusing to be controlled by the supreme lodge. After the division or schism, another local lodge was organized at Davenport, called "Evening Star Lodge." It was composed of members of the order who adhered to the supreme lodge. Some of the members were in doubt as to which body they should adhere, and after joining the Evening Star Lodge they continued to pay their assessments and dues to the other body through the Germania Lodge. These members were called "double headers." Warnebold united with Evening Star Lodge in 1884, and on the sixteenth day of November, 1886, he sur-

1. MUTUAL-benefit insurance: contract: membership in two lodges.

rendered his beneficiary certificate to the defendant herein, and a new certificate was issued to him. This last-named certificate was the only one held by him at the time of his death. After his death the loss was reported, and an assessment was made to pay the same, and said Warnebold was named therein as entitled to all the benefits of the order. But payment was refused, and is resisted in this suit upon the alleged ground that the plaintiff has already been paid the full amount to which she is entitled by the other state organization.

It is contended that Warnebold at no time held any life insurance in excess of two thousand dollars, and that, as that amount has been paid, there can be no further recovery. We are cited to the case of *Bock v. Ancient Order of United Workmen*, 75 Iowa, 462, as sustaining this claim. The cases are not parallel. In the cited case no new contract was made with what is denominated the loyal lodge. There was no surrender of the original certificate. In the case at bar a new contract was made with the defendant, the loyal lodge. It is this contract, the validity of which is in controversy in this action. It is wholly immaterial to the defendant what action the disloyal grand lodge took in regard to the settlement of any claim which the plaintiff had against it. The rights of the parties to this action must be determined by the certificate which it issued and upon which recovery is sought, and upon the fact whether Warnebold, at the time of his death, had forfeited his right to membership in the defendant lodge.

II. It is claimed that, although the said Warnebold had paid all assessments for death losses up to the time of his death, yet that he had forfeited his membership in Evening Star Lodge by failure to pay certain dues to the lodge. It is true that certain dues were past due at one time, but previous to his death these arrearages

2. ——: payment of dues: forfeiture: estoppel.

were paid to the satisfaction of the officer whose duty it was to collect dues. No action was taken by the lodge suspending Warnebold from membership because of this delinquency. So far as the records of the lodge disclosed, he was a member in good standing at the time of his death. But it is claimed that by failing to pay his dues at the proper time, by the constitution of the order he was suspended without any action being taken. This ignores all the rules of law applying to waiver and estoppel. The doctrine that there is something so binding and sacred in a contract of insurance that waiver and estoppel can have no application to them has long since been exploded. We need not cite authority upon this point. It is too well understood to be now questioned. When the defendant and its subordinate local lodge received Warnebold's money, and adjudged that he was in good standing when he died, it is not a matter of much consequence what may be the laws or rules or regulations of the order. If any court were to hold that in any ordinary contract such acts did not constitute a waiver of all delinquences, it would be an adjudication which would command the respect of no one, and there is no reason why a contract of insurance should be construed differently from any other contract.

III. It is further claimed that the said Warnebold had forfeited his right to membership by continuing his connection with the disloyal grand lodge. When he surrendered his certificate and entered into the new contract with the defendant, and took the certificate upon which this action is founded, he continued his membership in the disloyal lodge. There was nothing in the new certificate which in terms prohibited him from retaining his membership in the disloyal lodge. But the certificate required the member to comply with all the laws, rules and requirements of the order. It appears

8. ——: lodge resolution: notice.

that in February, 1886, the defendant grand lodge passed a resolution, of which the following is a copy:

"Resolved that this grand lodge will not pay the beneficiary named in the beneficiary certificate of any member of this jurisdiction who is affiliating with or paying assessments or dues to the rebel grand lodge of the Ancient Order of United Workmen, or to a subordinate lodge that holds allegiance to said rebel grand lodge, unless such member shall sever all connection with such rebel grand lodge, and surrender his old beneficiary certificate to this grand lodge, and receive a reissued beneficiary certificate under the seal of this grand lodge; such reissued certificate to bear the same number as the old surrendered certificate."

A copy of this resolution was served on Warnebold and others by order of the grand master workman. This service was made on the twenty-fourth day of August, 1886. The resolution served on Warnebold did not contain the words "unless such member shall sever all connection with such rebel grand lodge." It therefore did not prohibit continued connection with the rebel grand lodge, and the only requirement was that the benefit certificate should be surrendered and a new one issued. This copy was kept and retained by the said Warnebold, and was found among his papers after his death. It was, so far as appeared to him, the resolution adopted by the grand lodge, and upon which he had the right to rely. The court submitted to the jury two special interrogatories as follows: "Did August Warnebold, at the time he surrendered the old certificate and received the one sued upon, know the terms of the resolution passed by the so-called 'Loyal Grand Lodge' on February 4, 1886, and that said resolution by its terms required that members adhering to said 'Loyal Grand Lodge' should sever all connections with the so-called 'Rebel Grand Lodge,' notwithstanding that the copy of said resolution previously served

on him omitted said requirement?" The jury answered this interrogatory in the negative. It is claimed that this finding of the jury was not authorized by the evidence. All of the evidence tending to show that Warnebold had such knowledge consists of conversations had with him by others, much of which is of a loose and random character, and by an oral admission made by him that he had such knowledge. In our opinion, it cannot be said that the finding is not fairly supported by the evidence. We place great reliance upon the resolution served upon him, upon which, as we have said, he had the right to rely.

IV. Another interrogatory submitted to the jury was as follows: "Did any of the officers of the Evening Star Lodge, after said Warnebold received the certificate served upon him, and before his death, know that said Warnebold was affiliating with and was a member of Germania Lodge?" This interrogatory was answered in the affirmative. It is claimed that this finding is without support in the evidence. We do not regard this objection as well founded. We have examined the evidence with care, and it is sufficient to give our conclusion.

V. The court sustained objections to the testimony of one Camp, who was a delegate from the Evening Star Lodge to the grand lodge at the time the resolution in question was adopted, in which it was sought to show that said Camp made a verbal report of said resolution at a meeting of Evening Star Lodge. This ruling of the court is complained of by the defendant. It was correct. The evidence shows that Warnebold was not present at this meeting, and the offered evidence would not tend to show notice to him that such a resolution was adopted.

4. —: —: —: evidence.

VI. There are objections and exceptions to some of the instructions given by the court to the jury.

5. —: —: —: instructions. These instructions are to the effect that, in order to find that Warnebold was bound by said resolution, it must be found that he knew and believed that he was thereby precluded from any affiliation with the rebel lodge. We think, in view of the evidence relied upon to show such knowledge, the instructions were not erroneous. As we have said, the evidence on that question consisted largely in loose and random conversations as to what said resolution really was.

It is unnecessary to prolong this opinion. Finding as we do, that the answers of the jury to the special interrogatories are supported by the evidence, it follows that the defendant, by the knowledge of the officers of the subordinate lodge, knew that Warnebold maintained his relations with the rebel lodge, and made no objections thereto, waived any right to raise that question, and, if Warnebold, in remaining a member of the rebel lodge, did so without knowing that he was violating his contract with the defendant, the defense founded upon said resolution cannot avail the defendant. AFFIRMED.

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SECURITY COMPANY, Appellee, v. ELMORE M. KENT *et al.*, Executors, Appellants.

1. **Mortgage**: CONSIDERATION: FRAUD OF MORTGAGEE'S AGENT. Where C., having land mortgaged to S., employed a loan agent to negotiate for him another mortgage upon the same land with which to pay off the former mortgage indebtedness, and said loan agent took from C. his note and mortgage for the required sum payable to the order of K., and promised to pay the money received thereon to the satisfaction of the mortgage to S., and the note and mortgage given by C. was accepted by K. under the belief that certain moneys collected by the loan agent for him had been paid to C., but the money was not so paid, nor was it applied upon the mortgage to S., and had in fact been converted by said agent to his own use before the execution of C.'s note and mortgage to K., *held*, that the note and mortgage to K. were void for want of consideration.

2. ———: ———: RECOVERY OF MONEY PAID BY MISTAKE. C. having paid interest upon the amount of his note and mortgage to K. under the mistaken belief that the latter had paid such amount to S. in satisfaction of the mortgage held by him, *held*, that C. was entitled to recover of K. the amount of interest so paid.

*Appeal from Dallas District Court.*—HON. A. W. WILKINSON, Judge.

WEDNESDAY, MAY 27, 1891.

PATRICK J. Collins and his wife, and Elmore M. Kent, Henry B. and Herman L. Kent, as executors of the estate of Darius E. Kent, are defendants in this action. The plaintiff company brings the action for the foreclosure of a mortgage given by the defendant Collins and wife on the tenth day of May, 1880, to John R. Keep, to secure a coupon note for one thousand dollars. Keep assigned the note and mortgage to William Bolles, and Bolles to the plaintiff. On the twenty-fifth day of April, 1885, the defendant Collins and wife executed to Darius E. Kent another mortgage on the same premises, to secure a note for one thousand dollars, because of which the executors of his estate are made parties, and the lien of said mortgage is asked to be made junior to that of the plaintiff. The executors, by way of answer, aver a payment of the plaintiff's mortgage. The defendants Collins admit the execution and delivery of the two notes and mortgages, but say that in making the loan from Keep, for which the first note was given, one Hugh R. Creighton was the agent, and was afterwards the agent for the holders of the note, to whom payments of interest were made, upon authority of the holders, and at maturity of said note demanded payment; that Hugh R. Creighton was at that time the agent of Darius E. Kent, at Des Moines, to loan his money, and that Creighton represented to defendants (Collins) that he would procure the money to pay off the plaintiff's mortgage from Darius E. Kent,

and that they executed the note and mortgage to Darius E. Kent under the belief and understanding with Creighton, as agent for Kent, that one thousand dollars had been paid by Kent to Creighton for the plaintiff, in *pro tanto* satisfaction of his mortgage; and that they paid to Creighton ninety-one dollars and fifty cents, being the balance due thereon. They further say, upon information and belief, that the one thousand dollars was never paid by Kent to Creighton for the plaintiff, and that the note to Kent is without consideration. They admit a liability on one of the notes, but deny that they are liable on both. They further say, by way of cross-action against the creditors, that, since making said note to Kent, they have paid to the executors three hundred dollars as interest thereon, and ask that, if the note shall be decreed of no force, they have judgment therefor against the executors. The executors deny that Creighton was the agent of Darius E. Kent in making the loan, and insist that the note is valid, and the mortgage a subsisting lien on the premises superior to the plaintiff's mortgage. The district court found that the note to Darius E. Kent was without consideration, and that the defendants Collins are entitled to recover the amount paid thereon as interest, and that the plaintiff was entitled to a decree, and gave judgment accordingly. The executors appeal.—*Affirmed.*

*Willard & Fletcher*, for appellants.

*Kauffman & Guernsey*, for Security Company, appellee.

*Baker & Haskins*, for Patrick J. Collins *et al.*, appellees.

GRANGER, J.—There is no question in the case as to the validity of plaintiff's note and mortgage, and its

1. MORTGAGE: consideration: fraud of mortgagee's agent.

right of recovery can only be defeated by a finding that the note has been paid. If paid, it must be the result of findings that Hugh R. Creighton was the agent of the plaintiff to receive payment, or had been so held out by plaintiff as to estop it to deny the agency, and that the money was paid to him as such agent. If Creighton ever secured the money as agent for the plaintiff, it came from Darius E. Kent as a consideration for the note made by Collins. This leads us to some extent to consider the relationship of Creighton to the several parties, and his operations in their behalf. By stipulations, it appears "that the Union Loan Association was in fact Hugh R. Creighton, he being the sole proprietor of the company, and its business being in fact his;" also "that on or about the third day of June, 1885, Hugh R. Creighton absconded, having embezzled funds of various parties amounting to many thousands of dollars, and has not been heard from; and that said embezzlement covered a period of two or three years previous to that date." The application of Collins for the loan from Kent was in writing, and constituted Creighton his agent to procure it. It is undisputed that Kent did not forward or pay to Creighton any money for the purpose of the loan, and it is equally undisputed that Creighton had been acting for Kent in making certain collections in Iowa. Of the collections thus intrusted to Creighton was what is known as the "Ratigan Loan" of seven hundred dollars, of which three hundred dollars was paid in the years 1882 and 1883, and the remaining four hundred dollars, with some interest, was paid on the twenty-third day of February, 1885. These payments were made to Creighton, and the money had not been paid to Kent at the time of the application for the Collins loan. There had also been a sale on foreclosure judgment against one Galbreath in favor of Mr. Kent, under the management of Creighton,

and a certificate of the sale of the land for two thousand and seventy dollars was held by Mr Kent; and on the twenty-third of February, 1885, Kent, through Smith & Tennant, at Westfield, New York (the home of Kent), sent the certificate, with another, to Creighton, indorsed in blank by Mr. Kent, with the instruction, "Please sell them, and send some appls. for Mr. Kent to take, to reinvest the money." On the twenty-eighth of February, 1885, Creighton made to the Des Moines Savings Bank his note for three thousand dollars, for which he received the money, and deposited the certificate received from Kent as collateral thereto, and the note has not been paid. The application for the Collins loan from Kent was forwarded by Creighton in a letter dated April 18, 1885, as follows:

"*Smith & Tennant, Westfield, N. Y.*

"DEAR SIRS:—Inclosed find sat. piece of Michael Ratigan, which please have executed and return. The present owner wants to pay. Here also is Pat J. Collins' app. for one thousand dollars, five years, on one hundred and twenty-one acres in Dallas county. This is a good app. Have Kent take it with the balance due him on Galbreath cert. and collection on Ratigan loan above."

May 5, 1885, Creighton forwarded to Smith & Tennant, for Kent, the Collins note for one thousand dollars, with a stated account showing that the amount had been applied therefor from the Ratigan collection and the Galbreath certificate. No money was ever paid by Creighton to the plaintiff or Collins or Kent, and the only theory on which a consideration for the note can be sustained is that the money was so placed in the hands of Creighton, as the agent of the plaintiff or Collins, that Collins is bound thereby. None dispute that the intention was that the money from Kent was to be applied to the payment of the plaintiff's mortgage, and, if the money actually came into Creighton's hands to be thus applied, there is much reason to think that fact

would be conclusive as against Collins; for the agency in that respect is not questioned. But we think the fact is otherwise. The money on the Ratigan claim had all been collected before the Collins application was made, and some of it for two or three years. The Galbreath certificate was also received before the application, and applied by Creighton to his own use some weeks before. Creighton was, during this time, making base misrepresentations to Kent or his agents as to the condition of matters in his hands, and it quite clearly appears from the evidence that, before the application was made by Collins, Creighton had embezzled the certificate and the collections from the Ratigan loan, and that no part of the proceeds therefrom was in his hands at the date of the Collins note to Kent. This fact being established, Creighton never held the money as the agent of Collins or the plaintiff, nor was it ever placed in his hands for that purpose. That Kent supposed the money was there could make no difference. If the Collins application had not been made, Kent's situation would be the same as to Creighton. At the time of the application Creighton had already applied the money to his own use, and became in a short time an absconding debtor. The loss had actually occurred to Kent, though unknown, before Creighton became the agent for Collins to make the loan. It is, then, a fact that Kent paid no consideration whatever for the Collins note. It is said that the note and mortgage are an acknowledgment of the receipt of the money, and the burden is with Collins to show why the money did not come into the hands of Creighton. Conceding the burden to be thus placed, we think the testimony abundant to show that fact. In truth, it is hardly open to question, from a fair consideration of the evidence. This view accords with the finding of the district court, and is conclusive as to the claim of the executors.

II. It is said that there is no theory on which defendant Collins can recover back the interest paid to the executors on the note. This interest was paid under a belief that Kent had furnished the money for which the note was given. It was a plain mistake of facts, and the law clearly justifies its recovery. AFFIRMED.

2. ——: ——: recovery of money paid by mistake.

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SIMON B. BELLOWS, Appellee, v. EDWARD H. LITCHFIELD, Executor, Appellant.

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1. **Breach of Warranty**: LIMITATION OF ACTIONS: EVIDENCE. In an action for damages for the breach of a covenant of warranty in a deed for lands commenced more than ten years after the execution of the deed the defendant, who was a non-resident, sought to show that the action was barred because he had for the period of ten years maintained an agency in the county wherein the lands were situated, and offered evidence tending to show that he had kept an office in such county for the purpose of transacting a land business during the time specified, and that a person named had acted as clerk in charge of the office. Books of record, which were claimed to have been brought from that office, and which showed transactions in regard to the lands in controversy, were offered in evidence, but were not identified as being the record of an office or agency kept by the defendant, and were, therefore, rejected. Furthermore, it did not appear that the purchase of the land in question was a transaction growing out of the business of that office. *Held*, that the jury was authorized in finding that the defendant did not have an office or agency in the county wherein the lands were situated within the meaning of section 2613 of the Code.

2. ———: SALE OF LAND FOR TAXES: RIGHT OF ACTION. After an adjudication that the plaintiff had no title to the land in question under the deed from the defendant the same was sold for taxes, and subsequently a tax deed issued. *Held*, that the right of action upon the defendant's covenant of warranty was not thereby lost to the plaintiff.

3. ———: ADJUDICATION OF TITLE: LIABILITY OF WARRANTOR. At the time of the conveyance to the plaintiff one T. was in possession of the land in question, and refused to surrender possession. Thereupon the plaintiff commenced an action against T. to recover the land, and gave notice thereof to defendant's testator, with the demand that he appear in court with proofs of title necessary to give the plaintiff possession. Afterwards, at the request of the testator's agent in a

personal interview, the attorney previously employed by the plaintiff was discharged, and one H. employed to conduct the suit. While H. was paid by the plaintiff for his services, the litigation was practically controlled by the agent of the defendant's testator, and for the latter's benefit. *Held*, that under the circumstances the testator was responsible for the manner in which the case was conducted, and was bound by the final result of the litigation.

4. **Evidence:** OPINION. Proof of the expression of an opinion by an attorney as to the law applicable to a case, *held*, competent as a part of a material conversation between the plaintiff and the testator's agent, and as tending to explain the subsequent conduct of the parties.

5. **Breach of Warranty:** JOINT LIABILITY OF HUSBAND AND WIFE: DAMAGES. Where, before the enactment of section 1937 of the Code, a husband and wife joined in a conveyance of lands containing a general covenant of warranty, *held*, that although the land was the property of the wife, the husband was liable thereon, and that the measure of damages was the amount of consideration paid, whether as principal or interest, together with interest thereon at six *per cent. per annum* from the dates of payment.

*Appeal from Polk District Court.*—HON. MARCUS KAVANAGH, JR., Judge.

WEDNESDAY, MAY 27, 1891.

THIS is an action to recover damages on account of a breach of covenant in a warranty deed. There was a trial by jury resulting in a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*Gatch, Conner & Weaver*, for appellant.

*Kauffman & Guernsey* and *M. D. O'Connell*, for appellee.

ROBINSON, J.—On the twenty-fourth day of February, 1870, Edwin C. Litchfield, and Grace H. Litchfield, his wife, residents of the state of New York, executed to the plaintiff a deed to lots numbered 3 and 4, of section 27, township 92 north, of range 28 west, in Humboldt county. The deed recited a consideration of fifteen hundred and fifty-four dollars, and

contained a covenant in words as follows: "And we do hereby covenant to warrant and defend the title to said premises to the said Simon B. Bellows against the lawful claims of all persons whomsoever." In March, 1863, George Todd entered the land described under the homestead laws of the United States, but in January, 1869, his entry was canceled, on the ground that it conflicted with the Des Moines river grant. Todd was in possession of the land when the deed to the plaintiff was given. He refused to surrender possession, and in May, 1870, the plaintiff commenced an action against him to recover the land in controversy, with other land. A trial was had, which resulted in a judgment for Todd. On appeal to this court the judgment was reversed. *Bellows v. Todd*, 34 Iowa, 19. The cause was remanded to the district court, and a new trial had, which resulted in a second judgment in favor of Todd. An appeal was again taken, which resulted in an affirmance of the judgment as to the lots now in controversy, for the reason that no conveyance from one Hubbard to the Litchfields, and, therefore, no title in the plaintiff had been shown. *Bellows v. Todd*, 39 Iowa, 209, 219. After the decision on the second appeal the plaintiff filed an amended petition in equity, in which he asked that the second judgment be set aside, and a new trial be granted. The grounds upon which that relief was demanded were, in substance, that a deed to Grace H. Litchfield had in fact been introduced in evidence on the second trial, but that the plaintiff had been wrongfully deprived of the benefit of it through the neglect of the short-hand reporter in failing to note that it had been introduced, and the wrongful refusal of the trial judge to certify it in the bill of exceptions. An answer to the amended petition was filed, and a trial had, which resulted in a judgment in favor of Todd. On appeal that judgment was affirmed by this court. *Bellows v. Todd*, 52 Iowa,

359. Edwin C. Litchfield died in July, 1885, and this action was commenced against the executor of his estate in October, 1888. The plaintiff seeks to recover the amount of the consideration paid by him for the land in controversy, with interest thereon. He alleges that since the year 1866 Edwin C. Litchfield has owned a large amount of land in Humboldt, Webster, Boone, Polk and other counties in Iowa, and that for the purpose of transacting the business which was involved in the management and sale of said lands he appointed one John Browne, of the city of Des Moines, to act as his general agent, and that said Browne acted as his agent for a number of years; that in the year 1870 the plaintiff employed J. A. O. Yeoman, an attorney of Ft. Dodge, to institute in his behalf the action against Todd to recover the land, and that the suit was commenced by Yeoman; that shortly after it was commenced the plaintiff notified Litchfield, through Browne, of the suit, and of the claim of Todd, and demanded that the plaintiff be put in possession of the land; that thereupon Browne, as the agent of Litchfield, directed the plaintiff to discharge Yeoman, and employ Theodore Hawley, who was an attorney in a large number of suits involving the title to his lands, and that, in pursuance of that direction, Yeoman was discharged, and Hawley was employed; that Hawley had the exclusive management of the case in the trial court, and that the general attorney for Litchfield managed it in this court; that in consequence of the facts stated the estate of Litchfield is liable for the damages sustained by reason of the breach of the covenant of warranty in the deed to the land. The defendant contends that the land in controversy was owned by Grace H. and not Edwin C. Litchfield when the deed to the plaintiff was executed, and that the latter never claimed to own it; that a perfect title was in fact conveyed by the deed, and lost through the

negligence of the plaintiff in failing to introduce the Hubbard deed in evidence on the second trial with Todd. Defendant denies that Hawley was employed by Litchfield in the Todd suit, and insists that Browne had no authority to employ him. The defendant further alleges that this action is barred by the statute of limitations, for that the cause of action accrued on the twenty-fourth day of February, 1870, when the deed was executed,—more than ten years before the action was commenced; and from the year 1866 until the year 1882 Litchfield had an office and agency in Boone county, kept by said Browne, for the transaction of all business connected with his lands in Iowa. The jury found specially that the plaintiff notified Litchfield to appear and prosecute the suit against Todd; that Litchfield appeared to prosecute or assist in the prosecution of the suit; and that he did not have an office or agency in Boone county for the transaction of the business of the sale of lands owned by him for the ten years next following the giving of the deed, nor for any portion of that time. The non-residence of Litchfield when the deed was given and at all times subsequent thereto is admitted.

I. The court instructed the jury that, if the defendant was liable, the cause of action accrued on the twenty-fourth day of February, 1870. That it appeared without controversy that Litchfield was a non-resident of this state up to the time of his death, and that the statute of limitations did not run in his favor unless by reason of the following provision of law: "When a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency in all actions growing out of or connected with the business of such office or agency."

1. BREACH of warranty: limitation of actions: evidence.

Code, sec. 2613. The court then charged the jury as follows: "Therefore, if you find that the said Edwin C. Litchfield was the owner of a large amount of land in the state of Iowa, and that he was engaged in the business of selling, controlling and managing said lands, and the land conveyed by said Exhibit B was a portion of the said lands so owned by said Litchfield, and sold in the course of said business to the said Bellows, and within ten years thereafter said Edwin C. Litchfield kept an office or agency in Boone county, Iowa, for the management and transaction of such business within the time of the duration of said agency or office in Boone county, Iowa, the statute of limitations herein ran in favor of Edwin C. Litchfield, the same as if said Edwin C. Litchfield were really a resident of the state of Iowa; and if you shall find that said office or agency continued and existed for ten years subsequent to the execution of said deed, Exhibit B, your verdict will be for the defendant." The plaintiff insists that under the undisputed facts of the case his action is not barred, and that the charge of the court is not correct; but, since he has not appealed, and the part of the charge objected to is not questioned by the appellant, it must be regarded as the law of the case, and it was the duty of the jury to follow it. *Crane v. Railway Co.*, 74 Iowa, 330, 334; *Dutton v. Railway Co.*, 66 Iowa, 352.

The only question raised in regard to the statute of limitations which we can determine is whether the jury was authorized to find that Litchfield did not have, for the period of ten years from and after the time of the giving of the deed, an office or agency in Boone county, where an agent or clerk was employed, within the meaning of section 2613 of the Code. The burden of proving that such an office or agency was maintained was upon the defendant. He introduced evidence which tended to show that Browne, as agent for Litchfield, kept an office in Boone county for the purpose of

transacting a land business during the time specified, and that his son, Jack Browne, and perhaps others, acted as clerk in charge of the office. Books of record, which were claimed to have been brought from that office, and which showed transactions in regard to the lands in controversy, were offered in evidence by defendant, but rejected. They were brought to Des Moines by Jack Browne, after the death of his father, which occurred in the year 1882; and the defendant sought to prove that Jack Browne stated when he delivered the books in Des Moines that they were all that were contained in the Boone county office. The statement was properly excluded, however, and the books were not identified as being the record of an office or agency kept by Litchfield. The plaintiff transacted no business with the office in Boone county, and had no personal knowledge of it. His transactions in regard to the land seem to have been had with Browne in Ft. Dodge or in Des Moines. It appears that Litchfield maintained an agency in the county named, but it does not appear that the purchase of the land in question was a transaction growing out of the business of that office. The purchase was in fact made in Des Moines, and most, if not all, the subsequent negotiations in regard to the Todd litigation were had in Ft. Dodge. We conclude that the jury were justified in finding that under the instructions given the cause of action of plaintiff was not barred by the statute. It is proper to state specifically, however, that we do not pass upon the correctness of the last paragraph of the charge quoted, nor hold that, had the agency in Boone county been maintained, as claimed by the appellant, this action would have been barred by the statute.

II. The land in controversy was sold in the year 1877 for the delinquent taxes of the years 1875 and 1876, and a treasurer's deed therefor was executed and recorded on the thirteenth

2. ——: sale of land for taxes: right of action.

day of October, 1880. The appellant contends that it was the duty of the plaintiff to pay the taxes, and that, by permitting the land to go to sale and deed, he, in effect, conveyed it to the grantee of the tax deed; that the covenant of warranty ran with the land; and that the tax sale and deed operated as an assignment of the right of action on the covenant. But it was not the duty of the plaintiff to pay the taxes for which the land was sold. Before they became due it was adjudicated that he had no title to the land. It is true that an effort was afterwards made to set aside that adjudication by a proceeding in equity, but an adverse decision was rendered by this court in that proceeding before the tax deed could have been issued. The right of action for the breach of warranty did not pass by the tax deed, as the title it conveyed was not derivative, but new and independent. *Crum v. Cotting*, 22 Iowa, 411. The authorities cited by the appellant in support of his claim on this point relate to involuntary alienations, as conveyance by means of execution sales, and are not applicable.

III. It is contended that Litchfield was not bound by the adjudication in the *Todd case*. In February, 1871, plaintiff sent to Browne, as agent of Litchfield, a notice in writing of his suit then pending against Todd, and a demand that Litchfield appear at court with the proofs of title necessary to give the plaintiff possession. After that notice was given the plaintiff had a conference with Browne, in Ft. Dodge, in which he was instructed to discharge Yeoman and employ Hawley to conduct the suit. If it be conceded that the written notice did not require Litchfield to take part in the litigation, an obligation to that effect may very properly be inferred from the conversation at Ft. Dodge, and subsequent conduct of the parties. Although Hawley was paid by the plaintiff for the services he rendered, there can be no

3. ——: adjudication of title: liability of warrantor.

doubt that the litigation was practically carried on and controlled by Browne as the agent of Litchfield, for the benefit of the latter. Therefore, Litchfield was responsible for the manner in which the case was conducted, and was bound by the failure of the attorney to introduce the Hubbard deed, and for the resulting effects. It is said that he employed attorneys to conduct the case in this court for the reason that he was interested in the question involved as affecting his title to other lands, but it is immaterial what his controlling motive was, so long as he managed the litigation in his own interest. *Stoddard v. Thompson*, 31 Iowa, 80; *Conger v. Chilcote*, 42 Iowa, 23; *Marsh v. Smith*, 73 Iowa, 296. Some question is made as to the authority of Browne to employ attorneys for Litchfield, but we think there can be no doubt that he was empowered to do so. It is said that some of the evidence to show his authority was improperly admitted, on the ground that it consisted of statements of Browne testified to by the plaintiff, and, therefore, incompetent under section 3639 of the Code. It is true that Browne was dead when the testimony was given, but the defendant was not his executor, assignee nor survivor, and the provisions of the section named do not apply. It may be that this case is within the reason of those provisions, but we cannot give effect to the statute beyond its manifest scope. *Johnson v. Johnson*, 52 Iowa, 590.

IV. The plaintiff testified that when he had the conversation with Browne in regard to the suit against Todd, Judge ELWOOD was present, and, after some statements in regard to the possession of the land, Judge ELWOOD asked Browne what title he had given the plaintiff, and, after being told that it was a warranty deed, said: "If you gave him a warranty deed, you have got to give him possession." The defendant complains because this statement was received in evidence. While it expressed an opinion as to the law applicable to the case, we think it was

4. EVIDENCE: opinion.

competent as part of a material conversation, and as tending to explain the subsequent conduct of the parties.

V. It is insisted that the plaintiff is not entitled to recover more than nominal damages, for the reason that Litchfield did not own and did not claim to own the land when the deed was given, and, therefore, that there was only a technical breach of covenant. The covenant of warranty in terms bound both husband and wife. Section 1937 of the Code had not then been enacted, and we are of the opinion that Litchfield was bound to the fullest extent of the language used. The judgment of the court in the *Todd case*, even though the result of negligence on the part of those who represented the plaintiff, in view of the participation of Litchfield in the management of the case, was an adjudication that title was not conveyed by the deed by which he was bound. Of the consideration specified in the deed the plaintiff paid three hundred and eighty-eight dollars and fifty cents when the purchase was made, and gave his note for the remainder, with interest thereon at the rate of ten per cent. per annum. The plaintiff was entitled to recover the consideration money paid, with interest thereon at the rate of six per cent. per annum from the date of payment. *Brandt v. Foster*, 5 Iowa, 295. The interest paid on the note at ten per cent. per annum was as much a part of the consideration for the deed as was the money paid when it was delivered. Therefore, the plaintiff was entitled to recover the amount actually paid, whether principal or interest, together with interest thereon at six per cent. per annum from the dates of payment.

5. BREACH of warranty: joint liability of husband and wife: damages.

VI. Other questions discussed by counsel are disposed of by the conclusions we have announced, or by recent decisions of this court. We discover no ground upon which to reverse the judgment of the district court. It is, therefore, AFFIRMED.

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# THE CAPITAL CITY BANK, Appellee, v. WAKEFIELD & EVANS *et al.*, Appellees, and W. D. TOWNSEND, Garnishee, Appellant.

1. **Practice**: WITHDRAWING ISSUE FROM JURY. Where there is evidence tending to support the issues in a cause the court may properly refuse to take the case from the jury.

2. **Garnishment**: ATTACKING TITLE OF GARNISHEE: PARTIES. In a garnishment proceeding wherein it was sought to charge the garnishee with the possession of notes and bonds belonging to the judgment debtor, and alleged to have been transferred to him to hinder and delay the creditors of the latter, but which the garnishee claimed to have purchased of P. and W. through the judgment debtor as agent for the assignors, *held*, that P. and W. were not necessary parties.

3. ———: JUDGMENT AGAINST GARNISHEE: PRACTICE. The trial of issues upon a garnishment in an action by attachment may be had, and a conditional judgment entered against the garnishee, before a judgment has been rendered in such action against the principal defendant.

4. **Special Verdict**: INSTRUCTIONS. An instruction to a jury that it should determine upon its answers to certain special interrogatories submitted to it in the same manner as upon its general verdict, and be careful that its answers be in harmony with and support its general verdict, *held*, not to be deemed prejudicial where the general tenor of previous instructions was that the jury should decide the case upon the evidence, and it must have understood that its answers to the special interrogatories were to be determined in the same manner.

*Appeal from Polk District Court.* — HON. MARCUS KAVANAGH, Judge.

WEDNESDAY, MAY 27, 1891.

THIS is an action aided by attachment under which the appellant Townsend was garnished as a supposed debtor of J. I. Wakefield. Issue was joined upon the answer of the garnishee, and a trial had upon that issue to a jury, resulting in a verdict and judgment for the plaintiff, from which the garnishee appeals.—*Affirmed.*

*St. John, Stevenson & Whisenand*, for appellant.

*Read & Read*, for appellee.

GIVEN, J.—I: The appellant answered that he had purchased certain notes and bonds of Mrs. N. J. Paulk and Mrs. M. A. Wakefield, of California, through J. I. Wakefield, their agent. Plaintiffs joined issue, alleging that the notes and bonds belonged to J. I. Wakefield, and were transferred by him to the appellant to defraud, hinder and delay the creditors of Wakefield. At the close of the testimony the appellant moved for a verdict, on the ground that there was no evidence upon which to find against him, which motion was overruled, and the ruling is assigned as error. No desirable purposes would be served by a discussion of the testimony. It is enough to say that there was testimony tending to sustain the claim of the plaintiff, and that the court properly submitted the issues to the jury.

1. PRACTICE: withdrawing issue from jury.

II. Appellant contends that Mrs. Paulk and Mrs. Wakefield are necessary parties, and cites *Fowler v. Doyle*, 16 Iowa, 534, and *Miller v. Mahaffy*, 45 Iowa, 289. A marked distinction exists between those cases and this. The ground upon which it is sought to charge the appellant is that he received the notes and bonds for the fraudulent purpose of hindering and delaying the creditors of J. I. Wakefield. In *Fowler v. Doyle* there was no charge of fraud against the garnishee; it was simply a question whether the debt he owed was due to Fowler or to one Reilley, who was a necessary party, so that the garnishee might not be required to pay the debt twice. In *Miller v. Mahaffy*, the plaintiff and his brother Robert held the land under a contract of purchase, and Robert assigned the contract to Mahaffy. The plaintiffs charged that it was without consideration, and asked to

2. GARNISHMENT: attacking title of garnishee: parties.

have the assignment set aside, and it was held that Robert was a necessary party. This case is more nearly within the principle announced in *Potter v. Phillips*, 44 Iowa, 353, that a fraudulent grantor is not a necessary party to an action against his grantees to set aside a conveyance alleged to be in fraud of his creditors. It is there said: "Whether the conveyances were fraudulent or in good faith, the property has irrevocably passed beyond his control. In no way can he be prejudiced in a legal sense by a determination which subjects the property to the payment of his debts." The same is true of Mrs. Paulk and Mrs. Wakefield, though they are not the debtors. We think they are not necessary parties to this proceeding.

III. This action was commenced against the defendants September 26, 1887. The verdict against the appellant was rendered on the fourth day of December, 1888, and judgment was entered on the verdict, January 19, 1889. On December 16, 1889, an order was made entering judgment against the defendants, and in favor of the plaintiff, as of December 8, 1888. The appellant complains that the court refused to submit the question of defendants' indebtedness to the jury, and that the verdict was returned, and judgment rendered against him before there was any adjudication finding an indebtedness from the defendants to the plaintiff. It will be observed that judgment was entered as of the date between the return of the verdict against the appellant and the entering of judgment against him. There was no issue between the appellant as garnishee and the plaintiff as to the indebtedness of the defendants; therefore, there was no necessity of introducing evidence of such indebtedness, nor of submitting that question to the jury. While it is true a garnishee will not be held liable to the plaintiff unless there is a debt due to the plaintiff, it does not follow that the trial of

3. ——: judgment against garnishee: practice.

issues joined upon the answer of the garnishee must be deferred until final judgment between the plaintiff and defendant. Section 2988 of the Code provides that, if it is made to appear that the garnishee was indebted to the defendant, or had any of the defendant's property in his hands, at or after he was served with notice, "he is liable to the plaintiff in case judgment is finally recovered by him; * * * and a conditional judgment shall be entered against him accordingly, unless he prefers paying or delivering up the same to the sheriff, as above provided." In *Bean v. Barney*, 10 Iowa, 498, it is said: "The right of a plaintiff to a judgment against the garnishee does not exist until there is final judgment against the defendant in the attachment." This is doubtless true as to an unconditional judgment, such as seems to have been entered in that case; but surely the court may enter such judgment as will hold the debt or property pending the final adjudication. In that case it is said: "It does not appear from the record in this case that a judgment was ever obtained by the plaintiff against Bancroft." In this case there was in fact a judgment in favor of the plaintiff against the defendants before any judgment was entered against the appellant, though it was not entered of record until after judgment against the garnishee. There was no error in refusing to submit the question of the defendants' indebtedness to the plaintiff nor in entering judgment against the appellant when and as it was entered.

IV. At the conclusion of the instructions the court submitted three special interrogatories, with this instruction: "You will decide upon them in the same manner as your general verdict, and answer the same. You will be careful, however, that these answers are in harmony with and support your general verdict." The appellant contends that this instruction "requires the jury to

4. SPECIAL VERDICT: INSTRUCTIONS.

answer the interrogatories, not with reference to the facts of the case as shown by the evidence, but with reference to their general verdict only." That the findings and verdict should be in harmony is not questioned, nor that the court may instruct the jury to exercise care in that respect. Special findings are of ultimate material facts only, and, when found, the result—the general verdict—follows therefrom. It is clear that a jury should first decide from the evidence what the ultimate facts are; that is, the essential facts which control as to what the verdict should be. With these facts found, they should then decide to what result—what general verdict—they lead. The jury were sworn to decide the case according to the law as given by the court, and the evidence. The general tenor of previous instructions is that they should decide the case upon the evidence, and then they were specifically told that they must decide upon these special questions in the same manner as their general verdict. Thus far the jury could be in no doubt but that they were to decide the special questions from the evidence. The caution which follows could not lead to a different conclusion. True, it would have been more exactly correct if it had cautioned them to be careful that their general verdict was in harmony with the answers, as the answers control; but we do not think, in view of what preceded, that the jury could have understood that they were to decide upon their answers to the special interrogatories from anything but the evidence. *People v. Murray*, 52 Mich. 289; 17 N. W. Rep. 843.

Our conclusion upon the whole record is that the judgment of the district court should be AFFIRMED.

# JAMES H. O'BRIEN, Appellant, v. MARQUIS BARR, Warden, etc., Appellee.

1. **Constitutional Law**: LEGISLATIVE POWERS: DESIGNATION OF PENITENTIARY. Section 1, chapter 43, of the Acts of the Fourteenth General Assembly, and section 8, chapter 40, of the Acts of the Sixteenth General Assembly, establishing a penitentiary at Anamosa, and providing that such convicts shall be confined therein as may be designated by the executive council of the state, are not in conflict with section 1 of article 5 of the constitution of this state, vesting the judicial power of the state in a supreme and district courts.

2. ———: ———: ———. Under the above statutes the executive council may order the removal from the penitentiary at Ft. Madison to that at Anamosa of all convicts of a class described, without naming the particular convicts so to be transferred, but leaving the selection of those falling within such class to be made by the warden.

*Appeal from Jones District Court.*—HON. J. D. GIFFEN, Judge.

THURSDAY, MAY 28, 1891.

ON September 29, 1888, the plaintiff filed his petition in *habeas corpus*, upon which a writ was granted, and to which the defendant made answer. The plaintiff demurred to the answer, and, the demurrer being overruled, elected to stand upon his demurrer, and refused to reply or plead over, whereupon the court ordered that he be remanded, and remain in the custody of defendant. The plaintiff appeals.—*Affirmed.*

*John McKean*, for appellant.

*John Y. Stone*, Attorney General, and *F. O. Ellison*, for appellee.

GIVEN, J.—It appears from the petition and answer that the plaintiff was duly sentenced by the

district court of Wapello county at the January term, 1884, to imprisonment in the penitentiary at Ft. Madison, at hard labor, for a term of eight years, and was committed to that prison in pursuance thereof. The answer shows that he was placed in the custody of the defendant as warden of the state penitentiary at Anamosa, by virtue of an order or resolutions of the executive council of the state, copies of which are set out as follows:

"At a meeting of the executive council held on the sixteenth day of February, 1886, the following, among other, proceedings were had, to-wit: In the matter of the transfer of convicts from the Ft. Madison to the Anamosa penitentiary the order made by the council at its meeting of February 10, 1886, was modified as follows: It was ordered that the transfer be made from convicts received subsequent to February 1, 1886, and to be such as can be spared without conflicting with contracts already made, until the whole number confined in the said Ft. Madison penitentiary shall be reduced to four hundred (400), provided that number shall not exceed twenty-five.

"FRANK D. JACKSON,

"Secretary of State and Secretary of the Executive Council."

"April 9, 1886.

"*To Hon. George W. Crosley, Warden of the Penitentiary at Ft. Madison:*

"You take notice that at a meeting of the executive council of the state of Iowa, held on the fifth day of April, 1886, the following resolution was adopted by said council, to-wit: 'Resolved, that the warden of the penitentiary at Ft. Madison be authorized to transfer twenty convicts from said penitentiary to the penitentiary at Anamosa, the said transfer to consist of such convicts only whose removal will in the judgment of the said warden be most consistent with the interests of

the state and the proper treatment of its convicts, and with a due regard for the existing contracts for the employment of convict labor. Resolved, that all orders heretofore made by this council in relation to the transfer of convicts be, and the same are hereby, revoked and rescinded, except in so far as transfers have been actually made under such orders.'

"FRANK D. JACKSON,

"Secretary of State and Secretary of the Executive Council."

The grounds of demurrer are that said orders of the executive council are without authority of law and void, and do not mention or bind the petitioner, and that the plaintiff can only be confined in the penitentiary of the state as sentenced, and that the sentence cannot be modified or contradicted by order of the executive council.

I. By section 1, chapter 43, of the Acts of the Fourteenth General Assembly, and section 8, chapter 40, of the Acts of the Sixteenth General Assembly, the penitentiary at Anamosa was established as a penitentiary of the state, "in which such convicts sentenced for life or any period of time as the executive council may designate shall be confined, employed and governed, according to the provisions of law relating to the government and discipline of the penitentiary at Ft. Madison." It is contended that this authority is in derogation of article 5, section 1, of the constitution, which provides: "The judicial power shall be vested in a supreme court, district court, and such other courts inferior to the supreme court as the general assembly may from time to time establish." Pronouncing this judgment of imprisonment was unquestionably the exercise of a judicial power. The imprisonment and its duration could alone be determined by the court. But fixing the particular penitentiary in which the petitioner

1. CONSTITUTIONAL law: legislative powers: designation of penitentiary.

should be confined is not a part of the judgment. The effect and duration of confinement is all that was judicially determined by the judgment. The conviction was for burglary, and the punishment provided in the statute is, "He shall be punished by imprisonment in the penitentiary," and not in any particular penitentiary. The state furnishes penitentiaries, and may provide in which one convicts or classes of convicts shall be confined. This is in no sense the exercise of judicial power. If the state is concluded by a judgment that the confinement be in a particular penitentiary from providing for confinement elsewhere, then the humane provisions of our statute for confinement elsewhere in cases of insanity or pestilence are for naught in such cases. If by such a judgment the state is precluded from providing for confinement elsewhere than in the penitentiary named, then, if from fire or other casualty the prison named becomes unsuitable as a place of confinement, the convicts must be turned loose. We are in no doubt as to the authority of the state to provide for the confinement of convicts in any of its penitentiaries during the period fixed in the judgment, and that the authority to designate the convicts to be confined in the different penitentiaries is legally vested in the executive council of the state.

II. It is complained that the petitioner was not designated by name by the executive council to be transferred to and confined in the penitentiary at Anamosa, but that it was left to the warden at Ft. Madison to select those who should be transferred under the resolution and order of the executive council. The authority is to designate. The law is silent as to how the designation shall be made. The authority being general, they may designate in whatever way will clearly point out the individual convict or class of convicts who are to be confined at Anamosa. It is under this authority that the council

2. —: —: —.

have designated that all female convicts and persons convicted in certain counties of the state shall be confined at Anamosa, and those convicted in other counties at Ft. Madison. The order under which the petitioner was transferred was for the transfer of a class of convicts,—that is, twenty convicts "whose removal will in the judgment of the state warden be most consistent with the interests of the state and the proper treatment of its convicts, and with a due regard for the existing contracts for the employment of convict labor." True, this left it to the judgment of the warden as to which convicts would come under the class designated in the order; but this did not, as is contended, call upon him to exercise judicial powers, and the selection and transfer were in nowise a modification or change of the judgment which had been pronounced against the petitioner. We think there was no error in overruling the plaintiff's demurrer to the answer, and in remanding him to custody.

The judgment of the district court is AFFIRMED.

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C. D. MALETTE, Appellee, v. G. P. ARNOLD, Appellant.

**Deed:** BREACH OF WARRANTY: RES ADJUDICATA. The defendant conveyed certain lands by deed, with covenants of warranty, to B., who conveyed the same to the plaintiff. At the time of the latter conveyance the plaintiff gave to B. his promissory note for six hundred and fifty dollars for a balance of the purchase money, but providing that said note was not to be paid if a certain adverse claimant established an interest in the property. Such interest was established in an action wherein the defendant and B. were parties, and B. in an action against the defendant alone, for a breach of the warranty in the deed to him, recovered the amount of the note above referred to, which the plaintiff was through the establishment of such adverse claim relieved from paying. The deed delivered by B. to the plaintiff was one of special warranty, but it being the agreement that he should have one of general warranty, the plaintiff by action against B., commenced after the rights of the adverse claimant had been determined, compelled B. to execute to him a general warranty

deed. *Held*, that the latter deed being valid, and the plaintiff having paid the court costs in the case wherein the rights of the adverse claimant were established, he was entitled to recover the amount thereof from the defendant, such sum not being included in the recovery on the defendant's warranty in the action by B.

*Appeal from Decatur District Court.*—HON. J. W. HARVEY, Judge.

THURSDAY, MAY 28, 1891.

ACTION upon the covenant of warranty in a deed. The cause was tried without a jury, and upon findings of fact a judgment was entered for the plaintiff. The defendant appeals.—*Affirmed.*

*Parrish & Hoffman*, for appellant.

*S. A. Gates* and *N. P. Bullock*, for appellee.

BECK, C. J.—I. The petition alleges that defendant and his wife conveyed, by warranty deed, certain lands to one Sarah F. Brown, who, with her husband, conveyed the land to the plaintiff by deed of special warranty, contrary to a written contract between the parties, requiring a deed of general warranty; that Mrs. Brown and her husband, in compliance with a decree of the district court, in a case brought by the plaintiff against them, executed another general warranty in accord with the terms of the agreement between the parties; that the covenants of this deed have been broken by the recovery of a part of the land by one Boyle, in an action against both the plaintiff and the defendant herein; and that the plaintiff was compelled to and did purchase of Boyle the outstanding title of the part of the land held by him. The defendant in his answer alleged that Brown conveyed the lands to the plaintiff by the first deed executed, which did not pass her claim against the defendant for a breach of the

covenants of the deed to her; that she brought an action against the defendant, and recovered judgment therein, which has been fully satisfied. The answer denies that the second deed contains the contract of warranty between the parties, and that the decree requiring the second deed was collusive, and that the defendant is not bound thereby.

II. The defendant's counsel insist that the findings of fact by the district court are lacking support in the evidence. We have, upon a proper consideration of the evidence, reached a contrary conclusion. Indeed, we think the controlling facts in the case are not in dispute, and rest wholly upon the deeds and records, which will be hereafter presented, or their contents stated with sufficient fulness. It will be seen, before we conclude this opinion, that there is no necessity to inquire into any doubtful or disputed question of fact. The facts of the case upon which the questions of law arise may be more briefly presented, mainly in the language of the findings of the court, as disclosed in the abstract, and more satisfactorily than by a statement otherwise of their substance. They are in the following language:

"Findings of fact and law: *First.* That on the twenty-sixth day of February, 1879, the defendant, G. P. Arnold and wife, for the express consideration of six thousand dollars, executed to Sarah F. Brown a warranty deed for the following described real estate, to-wit [describes it]. *Second.* That on the sixteenth day of March, 1880, said Sarah F. Brown, the grantee in the deed referred to in the above finding of fact, and her husband, for the express consideration of three thousand dollars, executed to the plaintiff, C. D. Malette, a deed to the following described land, to-wit [describing it], being a part of the same land sold by defendant to Sarah F. Brown; that said deed is marked 'Exhibit E.' *Third.* That said deed, marked 'Exhibit E,' was not delivered to the plaintiff, C. D. Malette, at

the date of its execution, but that said deed, with the contract, marked 'Exhibit A,' was, on or about the nineteenth day of August, 1880, deposited and left with Hugh Brown; that under said agreement, marked 'Exhibit A,' the plaintiff, C. D. Malette, paid said Sarah F. Brown two thousand dollars, and was to pay her the other one thousand dollars when the warranty deed to such premises should be delivered to him; but said one thousand dollars was not to be paid until the claim of one Wm. Boyle in and to a portion of said real estate was determined. *Fourth.* That when said deed, marked 'Exhibit E,' was deposited with Hugh Brown, the plaintiff believed that it was a general warranty deed. *Fifth.* That in the year 1881 Wm. Boyle brought an action in the circuit court of the state of Iowa, in and for Decatur county, against the defendant, G. P. Arnold and wife, this plaintiff, and Sarah F. Brown, claiming to be the owner of the undivided one-half of certain real estate [describing it]; the same being one hundred acres of the land conveyed by the defendant Arnold to the said Sarah F. Brown, and by said Sarah F. Brown to plaintiff. *Sixth.* That at the —— term, 1885, of said circuit court, there was a decree rendered in said cause in favor of said William Boyle, finding that he was the owner of the undivided half of said one hundred acres of land, and a decree of partition ordered, and referees were appointed to make division of said land; that said decree and judgment were afterwards affirmed by the supreme court of the state [25 N. W. Rep.]; that under said decree and order the referees set off to said William Boyle twenty-three acres of land [describing it], which was confirmed by the court; that plaintiff purchased said real estate from said William Boyle, and paid him fifteen hundred dollars therefor. *Seventh.* That defendant, G. P. Arnold, who was one of the defendants in the case of William Boyle *v.* Arnold and others, employed the

attorneys, and conducted and managed the defense in said cause of Boyle *v.* Arnold and others; that the plaintiff, C. D. Malette, while a defendant in said suit, took no part and was not consulted in the defense thereof; that there was a large amount of costs made in the trial of said cause in the circuit and supreme courts, which was taxed to the defendants herein; that on the twenty-fifth day of November, 1885, the plaintiff paid off the costs made in the circuit court, the sum of two hundred and two dollars and forty-five cents, and about the same time paid off the costs made in said cause in the supreme court, the sum of twenty-three dollars and fifty cents. *Eighth.* That on or about November 27, 1881, the plaintiff herein paid said Sarah F. Brown the sum of five hundred dollars, the same being a part of the one thousand dollars mentioned in the contract, marked 'Exhibit A,' and at that time said contract was destroyed, and the plaintiff herein, in lieu thereof, paid said Sarah F. Brown said sum of five hundred dollars, and executed his note to her, with security, for the balance due on said contract, amounting to about six hundred and thirty dollars, but said note was not to be paid in the event said William Boyle should prevail in said suit against the defendant, G. P. Arnold, and others; that at the time said contract (Exhibit A) was destroyed, and the five hundred dollars paid and conditional note given, the deed from Sarah F. Brown to the plaintiff, C. D. Malette, marked 'Exhibit E,' was delivered to the plaintiff; but the court finds that said deed was not examined or read by the plaintiff at said time, and he supposed and believed that it was a general warranty deed, and he left said deed with Hugh Brown to be recorded, and said Brown did have said deed recorded. *Ninth.* That, for the purpose of compelling said Sarah F. Brown to execute to him a warranty deed as stipulated in the contract (Exhibit A), the plaintiff brought

an action in the district court of the state of Iowa, in and for Decatur county, and at the January term, 1888, a decree was entered requiring said Sarah F. Brown to execute a warranty deed as required in said contract, and on the sixth day of February, 1888, the said Sarah F. Brown and her husband, in obedience to said decree, executed and delivered to the plaintiff, C. D. Malette, the deed, a copy of which is attached to plaintiff's petition, and marked 'Exhibit D.' *Tenth.* That on the nineteenth day of December, 1885, said Sarah F. Brown brought suit against the defendant, G. P. Arnold, for damages sustained by reason of a breach of warranty in the conveyance by defendant to the said Sarah F. Brown, and on the thirty-first day of May, 1887, she recovered judgment in said suit against the defendant Arnold, for the sum of ——— dollars and costs, which said judgment the defendant has paid; but the court further finds that in said action the said Sarah F. Brown was restricted in the amount of her recovery to the amount that said C. D. Malette had failed to pay her by reason of said Wm. Boyle having succeeded in holding the undivided half of said one hundred acres of land heretofore referred to. *Eleventh.* That at the time of the suit between said Sarah F. Brown and the defendant herein, referred to in the tenth finding of facts, the deed from said Sarah F. Brown to the plaintiff Malette marked 'Exhibit E,' was on file; so, also, was said contract, marked 'Exhibit A;' but the court finds that the recording of said contract did not impart notice to anyone of its contents, because it was not acknowledged as required by law; and the court also finds that the defendant Arnold, at the time of said suit, had no actual knowledge of said written contract. But the court does find that, at the time said contract was destroyed, and deed, marked 'Exhibit E,' was placed on record, and the conditional note referred to in finding number 8 was given, that S. H. Amos, who was

then the attorney of said Arnold, had knowledge of said written contract, and the contents thereof; and in this connection the court further finds that it was at the instance of the defendant Arnold and his attorney, that said deed, marked 'Exhibit E,' was placed on record before the interest of said Boyle in said real estate was ascertained and determined. *Eleven and one-half.* That the plaintiff Malette was not a party to said suit between said Sarah F. Brown and the defendant on her breach of warranty, but the court finds that he had personal knowledge that said suit was pending in court. *Twelfth.* The court finds that, at the time the defendant sold said real estate to said Sarah F. Brown, there was a dwelling-house situated on said land of the value of two thousand dollars, which was destroyed by fire prior to the time said Sarah F. Brown sold said premises to the plaintiff Malette. *Thirteenth.* That there is no testimony showing the proportionate value of the real estate set off to said William Boyle with the balance of the real estate sold by the defendant Arnold to said Sarah F. Brown, in the condition it was in at the time of sale, with said dwelling-house situated thereon; but there is testimony showing the proportionate value of said land so set off to said Boyle with the balance of the one hundred and forty acres conveyed by said Sarah F. Brown to the plaintiff Malette, which the court finds to be one-third of the value of said one hundred and forty acres, or one thousand dollars."

Upon the facts thus found, the court held that the defendant is liable for the costs paid by the plaintiff in the case against him brought by Boyle, and interest thereon at six per centum per annum, and that the five hundred dollars be paid Mrs. Brown pursuant to the arrangement between her and the plaintiff, and entered judgment accordingly.

III. Counsel for the defendant insist that the

recovery of Brown on the deed was an adjudication which cut off all right of the plaintiff to recover on the deed. It is plain that this position is not sound, for these reasons: Mrs. Brown recovered the sum only which she had failed to recover from the plaintiff, by reason of Boyle recovering a part of the land. It is plain that she suffered loss and injury by reason of the failure of the title, and that, therefore, she was entitled to recover her damages on the warranty. No other person could recover these damages, and she could recover from no other person than the defendant. It is equally plain that no other person had a claim against the defendant for these damages, and they have not been recovered by the plaintiff or any person other than Mrs. Brown.

IV. But, if it be admitted that Mrs. Brown was not entitled to recover, that does not affect the plaintiff's rights to recover in this action. He was not a party to that suit, and cannot be prejudiced in this action by an erroneous judgment in the other. We may, therefore, leave out of view the judgment in the action brought by Mrs. Brown.

V. We need only to inquire, is the plaintiff entitled to recover? If the deed executed by Brown to him is valid, and contains a covenant of warranty, there can be no doubt that, under the law, he has an action against the defendant as a prior warrantor. This, we think, is not doubted. But it is insisted that the deed is invalid. Surely, as between the plaintiff and Brown, it is not; for it is executed pursuant to an adjudication to which both were parties. As between them the deed is valid, binding and effective in bestowing upon the plaintiff the right to prosecute the defendant as the prior warrantor. The defendant cannot question the validity of the deed, and he is not prejudiced by it. He violated his covenant, and there have been damages sustained by the plaintiff, against which the defendant's

covenant was intended to protect his grantee and all subsequent grantees. He is not prejudiced by any agreement between the plaintiff and Brown, by which the plaintiff is enabled to recover the actual amount he lost. It is plain that, by the breach of the warranty, the plaintiff has suffered damages. The defendant interposes technical objections to defeat the plaintiff, and escape the obligation of his covenant. The law will not permit it. This is all there is in the case, and it demands no further consideration.

The judgment of the district court is AFFIRMED.

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## CASS COUNTY BANK, Appellee, v. GEORGE WEBER *et ux.*, Appellants.

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1. **Fraudulent Conveyances**: TRANSACTIONS BETWEEN HUSBAND AND WIFE. Where a wife, having money of her own, gave the same to her husband for general use, without any agreement or expectation for repayment, until, in later years, when the husband had become insolvent, the transaction was made a means of protecting the husband's property against his creditors. *Held*, that under the evidence the trial court properly found that the conveyance was without consideration, and made for the purpose of hindering, delaying and defrauding creditors.

2. **Homestead**: PARTIAL USE OF PREMISES FOR HOTEL: EXECUTION: EXEMPTION. Where a two-story brick building, with frame additions, was used in part for a homestead and in part as a hotel, and the cellar and rooms on the first floor used for hotel purposes were also used by the family either as a passageway between rooms occupied for homestead purposes or for ingress and egress to the premises, and the rooms in the second story, though used exclusively for hotel purposes, were inaccessible except by passage through a part of the premises occupied as a homestead, *held*, that the whole building should be treated as exempt from execution under the homestead law.

*Appeal from Cass District Court.*—HON. H. E. DEEMER, Judge.

THURSDAY, MAY 28, 1891.

THE defendants, George and L. A. Weber, are husband and wife. George Weber is a judgment debtor to the plaintiff bank. In 1885 George Weber conveyed to his wife eighty acres of land and four lots in the city of Atlantic, and this action is to set aside the conveyance as in fraud of the plaintiff's rights as a judgment creditor. The issues involve the *bona fides* of the transfer, and also the homestead character of the lots in the city of Atlantic. The district court made the following findings of fact and judgment entry.

"*First.* That on the twentieth day of November, 1886, the plaintiff recovered a judgment against one Wm. Kreamer and the defendant, George Weber, for the sum of six hundred and nineteen dollars and seventy-two cents, and ten-per-cent. interest from the date thereof, and the further sum of forty-nine dollars and nine cents costs, with six-per-cent. interest from the date thereof. *Second.* That said judgment is the property of the plaintiff, and wholly unsatisfied and unpaid, and that W. H. Kreamer is wholly insolvent, and has no property from which said judgment can be made. *Third.* That defendant, George Weber, has no property in his own name from which said judgment can be realized. *Fourth.* That on April 15, 1885, the defendant, George Weber, made and delivered to the defendant, L. A. Weber, his wife, a deed of conveyance for the following described real estate, to-wit: Lots 9, 10, 11 and 12, in block 14, in the city of Atlantic, Cass county, Iowa; and the north half of the northeast quarter of section 12, township 75 north, of range 35 west, fifth prime meridian, Cass county, Iowa, being the property then owned by the defendant, George Weber. *Fifth.* That said deed was made without consideration, and for the purpose of hindering, delaying and defrauding the creditors of the defendant, George Weber. *Sixth.* That part of the building on lot 12, block 14, Atlantic, Iowa, is occupied by the defendant,

L. A. Weber, as a homestead for herself and family, and was so occupied prior to the contracting of the debt herein. It is, therefore, ordered, adjudged and decreed by the court that the deed of conveyance from the defendant, George Weber, to defendant, L. A. Weber, his wife, conveying the above-described real estate, and recorded in book 79, on page 426, of the records of Cass county, Iowa, be held for naught, as concerns this plaintiff, and that the lien of this plaintiff's judgment is declared prior and paramount to any lien or interest the defendants, George or L. A. Weber, may have in the premises, except their right of homestead in and to part of the building situated on lots 11 and 12, block 14, Atlantic, Iowa; that plaintiff's judgment is hereby declared and established as a lien from the date thereof, November 20, 1886, upon the following described real estate, as prayed in the plaintiff's petition, to-wit: The north half of the northeast quarter of section 12, in township 75 north, of range 35 west, fifth prime meridian, Cass county, Iowa; and upon the upper story and the front room down-stairs, and the cellar thereunder, of the brick building situated on lot 12, in block 14, in Atlantic, Iowa; and also the upper story and the east room on the ground floor of the frame building joining the brick on the west, situated on the same lot and block; and also all the ground covered by the frame business house and stables, being the west end of lots 10, 11 and 12, and all of lot 9, all in block 14, Atlantic, Iowa." The defendants appeal.—*Modified and affirmed.*

*L. L. De Lano* and *Willard & Willard*, for appellants.

*Temple & Phelps* and *C. F. Loofburrow*, for appellee.

GRANGER, J.—I. This case, as to its facts in detail, is like many another, where a wife has money

1. FRAUDULENT conveyances: transactions between husband and wife.

in her own right which she gives to her husband for general use, without any agreement or expectation that it is a loan, or creates any obligation for payment, until in later years, when, through the vicissitudes of fortune, the transaction is made a means of protecting her husband's property against his creditors. From the evidence, though quite conflicting in many respects, the district court found that the conveyance was without consideration and for the purpose of hindering, delaying and defrauding the creditors of George Weber; and, after considering the evidence, we concur in its conclusion.

II. The more difficult question in the case is that of homestead exemption. The property claimed as a homestead is that in the city of Atlantic, lots 9, 10, 11 and 12. These lots have each a frontage of twenty-five feet and a depth of one hundred and forty feet. On lot 12 there was originally built a brick building, with the first floor designed for a business room and living rooms above. The property was afterwards sold to Dierkson & Hansen, who converted it into a hotel known as the "Farmers' Home." The first story was made into two rooms, the first being used as an office and bar room, and the other as a dining room. This building is fifty feet in length by twenty-two feet in width. The second story is reached by a stairway from the front room or office. Underneath is a cellar, access to which is by a stairway from the dining room. North, and as we understand, on the side of this brick building, was built a frame addition, with kitchen and bedroom. Other frame additions were also made to the brick building, in which were a sitting room and bedroom on the ground floor and bedrooms above. Between the sitting room and the dining room was a wash room, through which access was had from

2. HOMESTEAD: partial use of premises for hotel: execution: exemption.

the brick part to the bedroom, and through the wash room and bedroom into the sitting room, the sleeping rooms in this part being over the sitting room. It thus appears that the district court found that the parts of the building not occupied as a homestead are, of the brick part, the upper rooms, and the front room below, used as the office, and the cellar beneath; also the bedroom east of and between the sitting room and wash room in the frame part, as by its decree the plaintiff's judgment is made a lien thereon. We regret that the condition of the record leaves some uncertainty as to these particular facts. We have endeavored, however, to be precise in our findings. On the rear end of lots 10, 11 and 12, and on lot 9, there were erected some stables for the use of the hotel, and after Weber purchased the premises he built on the lots at the rear end a frame business house. The stabling was used by the defendants for the purpose of carrying on their business of hotel keeping, and neither that nor the frame business house was used as a part of the homestead, and the district court thus found.

Our findings of fact as to the homestead occupation do not exactly accord with those of the district court. That the defendants had a homestead in the premises is not questioned. Hence, we are not to inquire whether or not there is a homestead, but, conceding one, we inquire after its intent. In *Rhodes v. McCormack*, 4 Iowa, 368, it is said: "When an execution defendant shall use a particular building as a home, the whole of such building, in cases of controversy and disagreement, will be presumed to constitute and be a part of the homestead until it is shown by the party adversely interested that some specific portion is not of the homestead character, and, therefore, not exempt." As to the office room, the bedroom and the cellar we have no difficulty in reaching a conclusion that they are not brought within the rule. The most

that can be said is that there is shown to be, to some extent, a joint occupancy of them for homestead and hotel purposes. Of the bedroom it is true that it was used as a sleeping room for the guests of the hotel, but at the same time it was used by the family as a passage-way from the dining room to the sitting room, both of which were found to be parts of the homestead. Now, let us suppose the bedroom had not been used for a sleeping room by any person, but merely a room through which the family passed to the sitting room from other parts of the house. We do not think that state of facts would justify a finding that it was not used as a part of the homestead, nor do we think the mere fact of its use by guests of the hotel, while at the same time used for the other purpose, would divest it of its character as a part of the homestead. The front or office room was used as an office and bar room, but it was at the same time used by the family. It was a means of ingress and egress from the street. It was a front room, back of which was the dining room, and still back the wash room, bedroom and sitting room. These rooms were all devoted to the same purpose. At least, it does not appear that they were not, and we assume facts not otherwise established in harmony with the homestead right. It is not as if it was shown that one story of the building was used as a store or shop, or leased and occupied by a stranger, which use would indicate of itself a disuse by the family. The entertainment of hotel guests and of boarders is often in a manner to be consistent with an occupation at the same time by the family of the apartments as a part of the home. Such entertainments would, it is true, often, if not generally, be a limitation upon the use by the family of certain apartments, but not to the extent of exclusion. If the office room had not been thus used, but had been a room into which the family occasionally went, and through which it passed from the

other apartments to and from the street, we do not understand that it would, from such a state of facts, be so divested of a homestead character as to be liable to execution. Neither will the fact that it is so used in connection with another use have such an effect. The same is true of the cellar. It was used for hotel purposes, but also for the family. The business of the hotel and the support of the family as to work and supplies, as well as occupation, were so mingled naturally that it is a task of much difficulty to show separate occupations or use, and the burden of doing so is with the plaintiff.

The upper story of the brick building is divided into five sleeping rooms, and these (the record shows) were used exclusively for the guests of the hotel, and not by the family for homestead purposes; that is, they are a part of the homestead building, but not particularly occupied by the family. The legal problem in this respect, in the light of authority, is somewhat difficult. Following the rule of *Rhodes v. McCormack*, 4 Iowa, 368; *Mayfield v. Maasden*, 59 Iowa, 517, and *Johnson v. Moser*, 66 Iowa, 536,—that apartments of the homestead building, not occupied as such, are liable to execution,—and we should find for the plaintiff; and under these authorities our duty would be clear but for the fact that in this case the only means of access to these rooms is through the office room, which we hold to be a part of the homestead, and we possess no authority to invade the homestead right by continuing the present means of access, unless we extend what is now by many regarded as a rule of doubtful merit,—that of partitioning a homestead building between a debtor and his creditors, which we are not inclined to do. It would, of course, be idle to hold that a room or rooms in a building not used by the family were liable to execution, when the purchaser would have but a barren right,—the title without a right of occupancy or

use,—and that, so far as disclosed by the record, would be the situation in this case. In *Johnson v. Moser*, 66 Iowa, 356, the homestead was limited to the two middle stories of a four-story building, and a right of access was given to the fourth story by hatchways through the floors of the homestead part, and a hoisting apparatus connected with the fourth story. This means of access, it seems, was a part of the plan of constructing the building, and could be continued without any interference with the occupation of the homestead part of the building. It was, in effect, an independent means of access, and the hatchway could never have been regarded as a part of the homestead. It was, therefore, an invasion of the homestead right. The difference between that case and a right of access to these rooms, through the front room below, is too obvious to deserve notice. Such a right would be a serious impairment of the homestead privilege. For reasons certainly not stronger in *Wright v. Ditzler*, 54 Iowa, 620, a room used as a storeroom for the sale of merchandise was distinguished and held exempt from execution. Its sale would have interfered with the use and occupation of the living rooms above and cellar below. A similar thought is made use of in *Johnson v. Moser*, *supra*, in holding that parts of the building might be sold. It is said: "Their sale will not unreasonably interfere with the use of the defendant of those portions of the building which he occupies as a place of residence. The same cannot be said of this case, with a right of access as it now is. These considerations lead us to the conclusion that the entire building should be treated as exempt from execution under the homestead law, and that the decree of the district court should be thus modified.

III. A point is made in argument that the defendant, George Weber, was only surety for one W. H. Kreamer on the note on which the plaintiff's judgment was obtained, and that the plaintiff has alleged, but

has not proven, the insolvency of Kreamer. Without an intimation as to the law applicable, we think the fact is otherwise. With the additional abstract, we think the insolvency appears.

The decree of the district court is approved, except as to the modification suggested. MODIFIED AND AFFIRMED.

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## W. L. PATTON, Appellee, v. COOK & MORGAN, Appellants.

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| 83 | 71 |
| 93 | 626 |
| 94 | 155 |
| 83 | 71 |
| 138 | 51 |

**Agency**: REVOCATION: BOND: CANCELLATION. The defendants were employed by the plaintiff to sell for him a lot for two hundred and seventy-five dollars, one-third of which was to be paid in cash and a note to be given for the balance payable in one year, with interest at eight per cent. They afterwards notified the plaintiff that they had found a purchaser, and that the cash payment and note were ready to be delivered to him. Thereupon, the plaintiff executed a title bond with the place for the grantee left blank, but upon the delivery of the same to the defendants they offered him, instead of the money and note as aforesaid, five or ten dollars for an option on the purchase of the lot. The plaintiff then demanded the return of the bond or a compliance with the contract, but the defendant refused to do either, but filled up the bond with the name of one G., who assigned it to S. *Held*, that the rights of the parties were fixed when the defendants refused to pay the money and deliver the note in accordance with the contract, and were not affected by a subsequent tender by the defendants, and that the plaintiff was entitled to a cancellation of the bond.

*Appeal from Pottawattamie District Court.*—HON. H. E. DEEMER, Judge.

THURSDAY, MAY 28, 1891.

THE plaintiff seeks by this action to set aside and cancel a bond for a deed of a certain lot in Council Bluffs. There was a full hearing on the merits, and a decree for the plaintiff. The defendants appeal. *Affirmed.*

*Stone & Sims* and *Flickinger Bros.*, for appellants.

*G. A. Holmes* and *Harl & McCabe*, for appellee.

ROTHROCK, J.—The plaintiff was the owner of the lot in question. The defendants, Cook & Morgan, were real-estate agents. In the month of February, 1887, plaintiff authorized Cook & Morgan to sell said lot for two hundred and seventy-five dollars. The terms of sale were to be one-third cash and the balance payable in one year with interest at eight per cent. per annum. The purchaser was to execute a promissory note for the deferred payment. In a short time after this arrangement was made, Cook & Morgan notified the plaintiff that they had found a purchaser for the lot. Thereupon the plaintiff executed and acknowledged a title bond. It was a blank bond, in that the name of the purchaser was not filled in nor anywhere inserted in the bond. This fact cannot be said to be disputed.

The real question is whether Cook & Morgan filled the blank wrongfully, and without authority from the plaintiff. On this branch of the case there is a serious conflict in the evidence. We have examined the record with care, and we reach the same conclusion that was adopted by the district court. We think that a fair preponderance of the evidence shows that, when Cook & Morgan requested the plaintiff to prepare the bond they, or one of them, stated to him that the cash payment and the note for the deferred payment were ready to be delivered to him. When the plaintiff presented the bond, Cook & Morgan did not have the money nor the note, but offered the plaintiff five or ten dollars for an option on the purchase of the lot. This the plaintiff refused to accept, and, as the bond had been handed to Cook & Morgan, they refused to return it to the plaintiff. After some dispute and discussion between the parties, the bond was left in the hands of Cook &

Morgan. The plaintiff went to their office early the next morning, and demanded the bond or a compliance with the contract. Cook & Morgan refused to pay the money and deliver the note, and filled up the bond with the name of one Greenwood. He assigned it to the defendant Smith. In our opinion the rights of the parties were fixed when Cook & Morgan failed to pay the money and deliver the note to the plaintiff, and it is entirely immaterial what they did afterwards in the way of a tender. They had no authority to fill in the name of Greenwood in the bond. This question of fact is all there is in the appeal. The decree of the district court is AFFIRMED.

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## I. M. HARLEY, Appellant, v. MERRILL BRICK COMPANY, Appellee.

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| 83 | 73 |
| 88 | 248 |
| 83 | 73 |
| 92 | 624 |
| 83 | 73 |
| 96 | 330 |
| 83 | 73 |
| 121 | 276 |
| 83 | 73 |
| 124 | 748 |
| 83 | 73 |
| 132 | 240 |
| 83 | 73 |
| 140 | 434 |

1. **Nuisance**: DAMAGES: PROOF: INSTRUCTIONS TO JURY. Where in an action to recover damages alleged to have been sustained through the operation of a smokestack and brick kiln by the defendant, the plaintiff averred several distinct elements of damage in her petition, *held*, that an instruction to the jury, that to entitle the plaintiff to recover she must prove each and every allegation of her petition, was erroneous.

2. ———: ———: WHEN OF BOTH PUBLIC AND PRIVATE NATURE. One may recover for damages sustained by a nuisance though the damage sustained by him be of the same character as that sustained by the public, if the private damage be distinct from that suffered by the public.

3. ———: ———: LIABILITY OF ONE OF SEVERAL CONTRIBUTORS. It appeared from the evidence that the plaintiff's dwelling was situated about six hundred feet from certain tile works, that a railway was operated in the vicinity, that large quantities of soft coal were burned in the city, and that the smoke from the tile works, from the railway locomotives, and perhaps from the city at large, contributed to the injuries of which the plaintiff complained. *Held*, that the trial court erroneously instructed the jury that to constitute the defendant's works a nuisance the operation of its works alone could be considered, and that the creation of a nuisance by the smoke, soot

or gas given off by the defendant's works being combined with that given off by other industries would not render the defendant liable in an action against it alone. The rule being that each person who acts in maintaining a nuisance is liable for the resulting damage; such liability, however, being limited to the results of his own action if he acts independently.

4. ———: ESTOPPEL: CONDUCT NOT INDUCING ACTION. One's silence during the construction of a smokestack and brick kiln in the vicinity of his premises will not estop him from subsequently proceeding against the same as a nuisance, if the erection of such works was not induced thereby.

5. ———: PRIVATE INJURY: EVIDENCE. In such an action the existence of the alleged nuisance cannot be shown by evidence of the effect of the operation of the defendant's works upon people and property not in controversy.

6. ———: VALUE OF DEFENDANT'S WORKS AS EVIDENCE. Under the issue of estoppel pleaded by the defendant, *held*, that evidence of the value of the defendant's works was properly admitted.

*Appeal from Polk District Court.*—HON. CHARLES A. BISHOP, Judge.

THURSDAY, MAY 28, 1891.

ACTION to recover damages alleged to have been caused by the defendant in operating machinery and kilns for the purpose of manufacturing brick, and for the abatement of the same as a nuisance. There was a trial by jury, and a verdict and judgment for the defendant. The plaintiff appeals.—*Reversed.*

*Chamberlin & Stewart*, for appellant.

*Gatch, Conner & Weaver*, for appellee.

ROBINSON, J.—During the year 1888 the plaintiff owned, and with her family occupied, as a place of residence, a house and lot on East Fourth street, in Des Moines. The premises so occupied were about one hundred and eighty feet from the brow of a bluff which sloped abruptly westward. At the foot of the bluff the defendant, in the year named, constructed works for

the manufacture of brick. They included a smokestack, the top of which was nineteen feet lower than the bluff and brick kilns. The distance from the house of the plaintiff to the smokestack is three hundred and thirty feet, and from the house to the nearest part of the brick kilns it is two hundred and ninety feet. After the works were completed the defendant commenced to make and burn brick. The plaintiff claims that, in operating the works and burning the brick, the defendant used soft coal, and that large, dense clouds of black smoke and soot and gases were emitted from the smokestack and kilns, which were blown over and upon her premises, and into her house and other buildings; that in consequence the premises were rendered uncomfortable, unhealthy and unfit for habitation; that the house and its contents were damaged, and the vegetation injured, and some of it destroyed. The plaintiff demands judgment for one thousand dollars, and asks that the buildings, premises and business of the defendant be declared a public nuisance, and abated.

I. The court charged the jury as follows: "1. The burden is upon the plaintiff in this case to establish, by a fair preponderance of the evidence in the case, each and every of the allegations of her petition, other than such thereof as are expressly admitted in the answer. * * *

1. NUISANCE: damages: proof: instructions to jury.

"2. You are instructed that, in order that the plaintiff may recover in this action, she must have established, by a fair preponderance of the evidence which has been submitted to you: *First*, that she owned and occupied, as alleged, the premises described in her petition; * * * *second*, that the operation of the defendant's works constituted a nuisance; *third*, that she has suffered damages thereby in the respects alleged in her petition."

Objection is made to the portions of the charge quoted on the ground that, under the rule they

announce, the jury could not have found for the plaintiff, unless she had proved "each and every of the allegations of her petition." Since she averred several distinct elements of damage it is clear that she would have been entitled to recover had she established but a part of them. It is no doubt true that the court designed to instruct the jury that the plaintiff could recover only as to the causes of action which she had proven, and that the burden of proof was upon her, but we think the jury might have been misled by the language used. The second paragraph of the charge was of a nature to induce the jury to adopt a wrong construction. Taking the two paragraphs together, the jury might well have concluded that the plaintiff could not recover unless she had proven all the claims made in her petition.

II. Appellant complains of the last part of the second paragraph of the charge, which is as follows:

2. —: —: when of both public and private nature.

"* * * You are further instructed that, to entitle her to recover therefor, it must appear that the damage suffered by plaintiff is of a character different from that suffered by the public at large, it being a rule of law by which you will be governed that a private citizen cannot maintain an action as for the abatement of a nuisance, or to recover damages on account of a nuisance, unless such private citizen be damaged in a manner separate and distinct from the damage which is sustained by the public at large; that is, such private citizen must have suffered some injury to his person or personal rights, or to his individual property, in which injury the general public did not share or did not suffer from."

It is not strictly true that a person damaged by a nuisance cannot recover, if his damages be of the same character as those sustained by the public. If the health or property of a person be injured from such a cause, he may recover, although the health and prop-

erty of the general public affected by the nuisance be affected in the same manner. The character of the injury would be the same in each case, but the damages sustained by each individual would be distinct from that suffered by the public, and a recovery therefor would be permitted. It was said in *Park v. Railway Co.*, 43 Iowa, 638, that a nuisance may partake of a double character, and be both public and private, and that actions can be maintained in such cases by individuals, although many other persons sustain like injuries from the same nuisance. Section 3331 of the Code authorizes a recovery by any person injured by a nuisance. See, also, *Ewell v. Greenwood*, 26 Iowa, 380; 1 Hill on Torts, 555. Although it was probably not the intention of the district court to announce a different rule, we think the language used in the part of the paragraph quoted may have been misleading.

III. It appears that certain tile works are located about six hundred feet from the dwelling of plaintiff, and that a railway is operated in the vicinity of the tile works and the works of the defendant; also that large quantities of soft coal are burned in Des Moines. The evidence tends to show that smoke from the tile works, from the railway locomotives, and perhaps from the city at large, contributes to the injuries of which the plaintiff complains. On that showing the court charged the jury as follows: "4. Upon the question of nuisance, you are instructed that, to constitute the operation of defendant's works a nuisance, it must appear that the smoke, soot and gas given off or emitted therefrom are such, as by themselves, considered alone, constitute a nuisance. Though it may appear that the smoke, soot or gas given off from the defendant's works, when combined with that given off from other works or industries, did, so taken together, constitute a nuisance, yet the existence, if proven, of such a nuisance, so

3. ___: ___: liability of one of several contributors.

created, will not warrant a condemnation of the defendant's works in an action brought against it alone; the rule of law being that when one establishes works lawful in themselves, and not being in themselves a nuisance, they cannot be made a nuisance by proof that the operation thereof, combined with causes arising from the operation of other works in the vicinity, together constitute a nuisance. You are to determine, therefore, whether the operation of the defendant's works, as you find from the evidence they were operated, are considered by themselves a nuisance as defined in these instructions; and the existence of other works or industries in the vicinity, and the character thereof, and the operation thereof, is only to be considered by you as you are hereinafter instructed, in determining whether the operation of defendant's works, under all circumstances, was unreasonable and productive of damages, and hence a nuisance. In this connection you are to bear in mind that, if you find, under these instructions, that the operation of the defendant's works of themselves resulted in a nuisance, the defendant cannot escape a liability for the damages caused thereby, upon the ground, that plaintiff or her property was affected by other nuisances, or that the damages sustained by her, if any are proven, were caused in part by such other nuisances."

The jury were instructed in the second paragraph of the charge that the plaintiff could not recover unless she had shown that the operation of the works of defendant constituted a nuisance. The paragraph last quoted instructed the jury, in effect, that, in determining the liability of the defendant, the operation of its works alone could be considered, and that it would not be liable for a nuisance which was caused in part by others. In that we think there was error. It is well settled that each person who acts in maintaining a nuisance is liable for the resulting damage. If he act

independently, and not in concert with others, he is liable for the damages which result from his own act only. *Loughran v. City of Des Moines*, 72 Iowa, 386; *Ferguson v. Manufacturing Co.*, 77 Iowa, 578; *Sloggy v. Dilworth*, 38 Minn. 179; 36 N. W. Rep. 451; *Sellick v. Hall*, 47 Conn. 273; *Evans v. Railway Co.*, 1 S. E. Rep. (N. C.) 529; 3 Sutherland on Damages, 425; 1 Addison on Torts, 364; Gould on Waters, secs. 222, 398; Wood on Nuisances, sec. 831. And the fact that it is difficult to measure accurately the damage which was caused by the wrongful act of each contributor to the aggregate result does not affect the rule, nor make anyone liable for the acts of others. *Chipman v. Palmer*, 77 N. Y. 53; *Lull v. Improvement Co.*, 19 Wis. 101. It is said that a different rule applies to smoke than to other nuisances, for the reason that it is much more common, and in many cities not to be avoided. We know of no reason why the rule under consideration should not be applied to all nuisances, whether due to smoke, smell, water, gas, noise or other of the common sources of nuisance. See 2 Thompson on Trials, sec. 1899; *Crump v. Lambert*, L. R. 3 Eq. 412. But, however that may be, we are of the opinion that the rule applies to smoke nuisances. The case under consideration, if the claim of the plaintiff be well founded, illustrates its wisdom. The works of the defendant are nearer to the residence of the plaintiff than any other place in which coal is burned in considerable quantities. The plaintiff contends that the works of the defendant, when in operation, discharged great quantities of thick, black smoke, soot and gas, which were injurious to health and property; and that, if smoke, soot and gas came from any other source, it was in such small quantities as not to be annoying. If that be true it would be a perversion of justice to hold that the chief wrongdoer shall be held harmless, because, without the contributions of others, the cause of complaint would

not have been a nuisance, and, therefore, that the plaintiff is remediless. Under the theory of the court's charge no nuisance created by different persons, however great, could be abated if the acts of each person, considered apart from the acts of the others, would not amount to a nuisance. In our opinion that is not the law. In determining whether a nuisance exists in a given case all material facts must be considered; as the place where the acts complained of are done, the manner of their performance, their necessity and the authority under which the person responsible acts. If the smoke which is caused by the burning of soft coal throughout the city of Des Moines is offensive at times it does not follow that a nuisance, within the meaning of the law, has been committed, and that the occupant of each private dwelling-house in which such coal is burned is guilty of participation in it. If such a nuisance were committed there might be a contribution to it so slight and inconsequential that the law would not take notice of it. What relief, if any, in addition to the recovery of damages the plaintiff would be entitled to in this action, if she establish her claim, is a question not so presented that we are required to determine it.

IV. The defendant pleaded as a defense that the plaintiff was estopped to recover in this action, for the reason that she knew that the works in controversy were to be constructed, but made no objection thereto, although she knew the purpose for which they were designed; but with that knowledge she permitted the defendant to construct the works at a large expense, and acquiesced therein. The appellant complains of the portion of the charge which relates to that defense, on the ground that it failed to state, as an element of the estoppel pleaded, that the conduct of the plaintiff must have induced the defendant to act in constructing its works. We think

4. ——: estoppel: conduct not inducing action.

the complaint is well founded. There was evidence which tended to show that the defendant was not in any manner influenced in what it did by the conduct of the plaintiff. There was nothing in her conduct from which acquiescence might have been inferred, unless from her silence. She claims that she objected to the construction of the works, and that her objections were made known through her husband. But if she did not so object there was nothing done or omitted on her part which should estop her to recover, if the defendant was not induced to act upon what she did or omitted to do.

V. The appellant complains of the refusal of the court to permit witnesses, who resided near her, to testify as to the effect of the smoke, soot and gas from the defendant's works upon themselves and their families, and upon their premises. The evidence in question was properly excluded. It was not competent to establish the existence of the alleged nuisance by showing how it affected people or property not in controversy. *Fay v. Whitman*, 100 Mass. 76.

5. ——: private injury: evidence.

VI. The appellant complains that evidence as to the value of the defendant's works was admitted. We think it was competent, on the defendant's theory of an estoppel.

6. ——: value of defendant's works as evidence.

VII. Other questions are discussed by counsel, but are disposed of by what we have said, or are unimportant, or are not likely to arise on another trial. For the errors pointed out the judgment of the district court is REVERSED.

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# A. INGRAM, Appellee, v. CARL WACKERNAGEL, Appellant.

1. **Contracts**: PATENT AMBIGUITY: EVIDENCE. An agreement for the purchase of cattle, then being fed by the vendor, dated September 26, 1888, and providing for the delivery of "two loads now, two loads in two weeks, one hundred head in October next, and the remainder by the twenty-fifth of November," presents no ambiguity as to the time when the last of the cattle were to be delivered.

2. ———: BREACH OF: PERFORMANCE BY PARTY SEEKING DAMAGES. The above agreement provided that the cattle should be yarded at the vendor's shrink lot for twelve hours at night before shipment. The date provided for the last shipment fell on Sunday, and on that account the cattle were not put into the shrink lot until the night of the twenty-sixth. *Held*, that the vendor sufficiently complied with the contract.

3. ———: SALES OF PERSONAL PROPERTY: BREACH: REMEDY OF VENDOR. On the evening of November 26 the vendor telegraphed the vendee that he would hold the cattle until the next day subject to his order, and that if the cattle were not then received by the vendee he would take steps authorized by law to protect himself. *Held*, that, conceding such a notice was necessary, the vendor was not obliged to state what action he would take to indemnify himself against loss.

4. ———: ———: ———: ———. The market price in M. where said cattle were kept being controlled by the market price in C., and it not appearing that a better price could have been obtained in M., *held*, that the vendor had a right to ship the cattle to C., and that if he did so in good faith, and sold them for the best market price he could procure, he was entitled to recover of the vendee the difference between the contract price and the price received, with interest, after deducting the necessary expenses for shipping; and that evidence was admissible as to prices in C. from November 26 to the date of sale.

5. **Appeal**: ERROR WITHOUT PREJUDICE. A judgment will not be reversed in the supreme court because of errors of the district court in the admission of evidence which were without prejudice to the appellant.

6. **Practice**: ADMISSION OF EVIDENCE. Where a party upon the trial of a cause claims the right, and is permitted, to introduce evidence that is incompetent, he cannot complain of the introduction of evidence in rebuttal thereof.

*Appeal from Taylor District Court.*—HON. R. C. HENRY, Judge.

THURSDAY, MAY 28, 1891.

ACTION on an agreement for the purchase of cattle. There was a trial by jury, and a verdict and judgment in favor of the plaintiff. The defendant appeals. *Affirmed.*

*L. T. McCoun* and *A. J. Johnson*, for appellant.

*Laughlin & Campbell, Crum & Haddock* and *R. H. Spence*, for appellee.

ROBINSON, J.—The agreement in suit is contained in two instruments in writing, of which the following are copies:

"I have this day bought of A. Ingram two hundred and eighty-two cattle, at five dollars and twenty-five cents per hundredweight gross, to be delivered as follows: Two loads now, and two loads in two weeks, one hundred more in October next, the remainder by the twenty-fifth of November. Said cattle to be yarded at Ingram's scales twelve hours at night. Paid on the above, five hundred dollars.

"MT. AYR, IOWA, September 26, 1888.

"CARL WACKERNAGEL."

"I, A. Ingram, this day sold to C. Wackernagel two hundred and eighty-two cattle, now being fed by me in my feed lots, at five dollars and twenty-five cents per hundredweight gross, to be delivered as follows: Two loads now, and two loads in two weeks, one hundred head in October next, the remainder by the twenty-fifth of November. Said cattle to be yarded at my shrink lot twelve hours over night. Paid on the above, five hundred dollars.

"MT. AYR, IOWA, September 26, 1888.

"A. INGRAM."

Before the twenty-sixth day of November, 1888, the defendant had accepted all but one hundred and thirteen of the cattle specified in the agreement. On that day the plaintiff yarded the cattle which the defendant had not taken, and sent him a telegram, as follows:

"MT. AYR, IOWA, November 26, 1888.

"*To C. Wackernagel, Clearfield, Iowa:*

"Yard cattle to-night; will hold to-morrow, and protect myself afterwards. A. INGRAM."

The cattle so yarded were weighed the next morning, and then held until November 27, when the defendant not having appeared, they were shipped to Chicago, and there sold. This action is brought to recover the difference between the agreed price and the amount realized from the Chicago sale. The defendant denies that he has failed to perform his part of the agreement, and pleads several counterclaims. The judgment in favor of the plaintiff was for the sum of fourteen hundred and eighty-one dollars and thirty-seven cents.

I. The appellant contends that the agreement in suit is fatally defective by reason of an ambiguity as to the date of its performance, and that the defect is patent, and cannot be cured by parol evidence. When the subject-matter and language are considered, we think there is no ambiguity as to the time when the last of the cattle were to be delivered. The agreement referred to cattle which were being fed by the plaintiff at the time it was made. A part of them were to be delivered at once, a part in two weeks, one hundred the next month, and the remainder "by the twenty-fifth of November." There is nothing in the language used to justify the presumption that a delay of more than one year in delivering a part of the cattle was contemplated. The natural and only reasonable conclusion to be drawn

1. CONTRACTS: patent ambiguity: evidence.

from the clause, "one hundred more in October next, the remainder by the twenty-fifth of November," is that the November referred to immediately followed the October specified. That interpretation is in harmony with a common form of speech, and is sustained by authority. *Whitney v. Crosby*, 3 Caines, 90.

II. It is claimed that the plaintiff did not so far perform his part of the agreement as to be entitled to demand a strict performance on the part of the defendant; that the plaintiff did not give due notice of his intention to sell the cattle; and that he had no right to sell them in Chicago, and charge the defendant with the difference between the contract price and the price realized. The twenty-fifth day of November, 1888, was Sunday, and the time for performing the agreement was, in consequence, extended to the next day. No act necessary to the performance of the agreement could have been required on Sunday. *Post v. Garrow*, 18 Neb. 682; 26 N. W. Rep. 580; *Stryker v. Vanderbilt*, 27 N. J. Law, 71; *Salter v. Burt*, 20 Wend. 206; *Sands v. Lyon*, 18 Conn. 29; *Avery v. Stewart*, 2 Conn. 69; *Barrett v. Allen*, 10 Ohio, 432. Delivery of the cattle on that day would have been illegal. The cattle were required to be kept in the shrink lot twelve (not thirty-six) hours; and, therefore, could not have been placed in it Saturday, to be held there until Monday. The shrinking of the cattle was a part of, and necessary to, a delivery; therefore, it was a sufficient compliance with the agreement to place them in the lot on the night of the twenty-sixth of November for that purpose.

2. —: breach of: performance by party seeking damages.

III. The telegram sent by the plaintiff in the evening of November 26 was received by the defendant at noon of the next day. It informed him, in effect, that the cattle would be held on that day subject to his order, and that, if not received by him, the plaintiff

3. —: sales of personal property: breach: remedy of vendor.

would take steps authorized by law to protect himself. We do not think it was necessary for the notice to state just what action the plaintiff would take to indemnify himself against loss, even if it be conceded that a notice was required. See *Pollen v. Le Roy*, 30 N. Y. 554. The defendant knew that the time given him by the agreement in which to accept the cattle was at hand, and about to expire, and he must be presumed to have known what right his failure to receive the cattle would give to the plaintiff. The cattle market was declining. Promptness of action was important. Yet, with knowledge of all these facts, he made no preparation to carry out the agreement on his part, and evidently had no intention of performing it.

IV. The value of such cattle at Mt. Ayr and vicinity, especially for the number in controversy, was dependent upon and governed by the market price in Chicago. The defendant bought and shipped to that market. It is not shown that a better price could have been obtained in Mt. Ayr. The court, therefore, properly charged the jury that if the plaintiff had performed the agreement on his part, then upon the default of the defendant he had a right to ship the cattle to Chicago; and, if he did so in good faith, and sold them for the best market price he could procure, he was entitled to recover the difference between the contract price and the price received, with interest, after deducting the necessary expenses of shipping. The evidence shows, without material conflict, that the cattle were shipped to Chicago, and sold on the market in the usual manner, for the best price which could be obtained at the time of sale. That was a sufficient compliance with the requirements of the law to fix the liability of the defendant. 2 Benjamin on Sales, sec. 1165; *Pollen v. Le Roy*, 30 N. Y. 554; *Dustan v. McAndrew*, 44 N. Y. 76; *Lewis v. Greider*, 51 N. Y. 236; *Rice v. Manley*, 66 N. Y. 87; *Bagley v. Findlay*,

82 Ill. 524; *Ullman v. Kent*, 60 Ill. 271; *Young v. Mertens*, 27 Md. 126. Since the plaintiff was authorized to sell in Chicago, evidence as to prices and methods of conducting business in the Chicago market, when the cattle were shipped and sold, was material and proper. Nor should the evidence have been confined to Chicago prices on the twenty-sixth and twenty-seventh days of November. The cattle were received in Chicago on the thirtieth of November, too late to sell on that day. There is evidence which tends to show that the market was not good for a few days, and in consequence there was some delay in making the sale. Evidence of prices from the thirtieth of November until the day of sale was proper. The appellant complains of the refusal of the court to allow evidence as to the Chicago prices a few days after the sale; but, since there is no attempt to hold the plaintiff responsible for selling the cattle prematurely, the excluded evidence would not have been relevant to any issue in the case, and was immaterial. Moreover, the prices in question were shown by other witnesses for the defendant, and are not questioned.

V. The appellant complains of the rulings of the court in permitting the plaintiff to examine him as to his intent with respect to paying the claim of the plaintiff before this action was brought. It is at least doubtful if the questions objected to were proper, but the answers given show clearly that no prejudice resulted from the rulings in question. Therefore, their correctness need not be determined.

5. APPEAL: error without prejudice.

VI. The appellant complains of the refusal of the court to suppress the deposition of Charles Robinson, and to strike therefrom interrogatories numbered from five to fifteen, inclusive, and the answers thereto. The ground of objection to the deposition as a whole was that it was not properly authenticated. The defect

alleged was substantially the same as that held to be immaterial in *Vaughn v. Smith*, 58 Iowa, 556, and following the rule of that case the court rightly refused to suppress the deposition.

The objection to the portions of the deposition specified were that the testimony therein contained related to the sale of one hundred and thirteen head of cattle in Chicago and the markets of that city. For reasons already made apparent in our consideration of this case the testimony was competent, and properly submitted to the jury.

VII. The defendant testified that he had lost thirty-two hundred dollars by the plaintiff, before this action was brought, through his misrepresentations. The evidence was given in narrative form, and there was no opportunity to object to the statement before it was made. The plaintiff, in rebuttal, offered the evidence of a witness to prove declarations of the defendant to the effect that he had made a profitable contract with the plaintiff; and stated that, if the testimony as to the loss of thirty-two hundred dollars were stricken out, he would not insist upon the evidence offered. The defendant objected to the striking out of the testimony referred to, and it was permitted to remain, and the rebutting evidence offered by the plaintiff was received. It is clear that the testimony of the defendant in regard to his loss should not have been received, and that when the plaintiff claimed the right of rebuttal it should have been stricken out by the court on its own motion, if necessary; but since the defendant contended that it was competent, and it was permitted to remain in the record for that reason, he cannot now be heard to complain that evidence in rebuttal was received.

6. PRACTICE: admission of evidence.

VIII. Appellant complains of the refusal of the court to give certain instructions which he asked. It

is sufficient to say, without setting them out, that there was no error in refusing them. Some were objectionable because they sought to submit to the jury matters in regard to which there was no controversy, and some were erroneous.

IX. The conclusions we have announced dispose of all questions which we are required to determine. We discover no sufficient reason for disturbing the judgment of the district court. The evidence shows that it does substantial justice between the parties. The defendant has relied upon technical grounds to defeat a just liability, resulting from an agreement which appeared to be reasonable, and which he entered into freely. The plaintiff fulfilled its requirements on his part, and is entitled to compensation for the wrong done by the failure of the defendant. AFFIRMED.

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## J. H. HAYS, Appellee, v. ROBERT MCCORMICK, Appellant.

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1. **Swamp Lands**: SELECTION BY STATE: TITLE: EVIDENCE. The title to the swamp and overflowed lands within the borders of this state passed to the state under the act of congress of 1850, whether selected by the state as required by the act or not, and in an action to quiet title based upon said act evidence is admissible to show that the land in question was, in fact, swamp or overflowed land at the date of said act, though it was never listed as such, nor was ever patented in pursuance of said act to the state or county.

2. **Taxes**: MISTAKE AS TO TITLE: ESTOPPEL. For twenty-two years prior to the time that the plaintiff acquired his title from the county, the defendant's grantor paid the taxes upon the lands in controversy under the belief that it held the title thereto, but the land during such period in fact belonged to the county, and was exempt from taxation. *Held*, that the plaintiff as the grantee of the county was not estopped from denying the defendant's title, nor was the plaintiff liable for the taxes so paid.

3. **Conveyance**: SALE OF COUNTY LANDS: BOARD OF SUPERVISORS. It appearing that the sale of the lands in controversy was duly made by the board of supervisors to the plaintiff, *held*, that the title of the plaintiff was sufficient as a basis of recovery against the defendant, though the deed received from the board was defective.

4. **Taxes**: PAYMENT BY MISTAKE: REIMBURSEMENT. The plaintiff not having been relieved of any burden devolving upon him by the payment of the taxes above indicated, *held*, that he could not be required to reimburse the defendant therefor as a condition to having his title quieted.

*Appeal from Linn District Court.*—HON. J. H. PRESTON, Judge.

THURSDAY, MAY 28, 1891.

ACTION to quiet title to a forty-acre tract of land in Linn county. There was a decree for the plaintiff, and the defendant appeals.—*Affirmed.*

*E. S. Bailey* and *N. D. Parkhurst*, for appellant.

*Davis & Voris*, for appellee.

GRANGER, J.—The respective parties trace the origin of their titles to grants of land by the United States; that of the plaintiff being to the swamp-land grant act, approved September 28, 1850, as amended; and the defendant to the Iowa railroad grant of May 15, 1856, as amended. The claim of the record title of the parties is as follows: That of the plaintiff, the act of congress of 1850 granting to the states the swamp and overflowed lands unfit for cultivation within their boundaries; the act of the general assembly of 1853, granting to the counties the swamp and overflowed lands within their limits, which were, by the acts of congress in 1850, granted to the states; and a conveyance by the county of Linn to him, September 4, 1888. That of the defendant, the Iowa railroad grant of 1856; a certification of the land under the act by the commissioner of the general land-office, December 23, 1858, approved by the secretary of the interior, December 27, 1858, which list was, under chapter 167, Acts of the Eighteenth General Assembly, signed by the governor,

and attested by the secretary of state of Iowa, for the Cedar Rapids & Missouri Railroad Company, which company conveyed the land to the Iowa Railroad Land Company, and it to the defendant, October 20, 1885.

I. It is important that we first determine from the evidence in the case a question of fact, as to the actual character of the land on September 28, 1850, which is the date of the grant to the states of the swamp lands by congress. No intelligent discussion of the question can be given without quoting a volume of evidence that would be unwarranted, and of no practical use. Our examination of the evidence leads us to the conclusion that at the date of the grant the tract was overflowed land, within the meaning of the act referred to, and the case will be considered with that as an established fact.

II. The land in question is the southwest quarter of the northwest quarter of section 19, township 85, range 8 west. A stipulation in the case is as follows: "In order to avoid the introduction of evidence upon the subject hereinafter mentioned, it is stipulated and agreed by and between the parties that the county of Linn, prior to 1875, made selections of swamp lands, as shown by the records of the register of the state land-office, which selections so made embrace certain tracts in section 19, township 85, range 8, in Linn county, and among them the northwestquarter of the northwest quarter and the southeast quarter of the northwest quarter of said above-named section (the said selections so made, or a copy thereof, are on file in the secretary of state's office in the state of Iowa); and that the tract in controversy was not included in any such selections; and that, so far as shown by any record of the state or county, the tract in controversy has never been patented to the state, nor by the state to the county." It is said in argument that the fact that the land has never been selected as swamp land ought to be conclusive proof

1. SWAMP lands: selection by state: title: evidence.

that it is not, and that a presumption should follow the acts of the officers appointed to make the selections that they did their duty. That such a presumption should obtain to the extent of devolving on the plaintiff the burden of showing that land was actually swamp or overflowed, so as to bring it within the grant, meets with our approval; but that it should obtain to the extent of becoming conclusive as against the actual facts is a rule unsupported, we think, by either reason or authority. That the grant vested the state with the title to such lands as were within the purview of the act is so well established on authority that only a reference to the fact is required. It has been held that the act by its own force operated to pass the title at once. *Allison v. Halfacre*, 11 Iowa, 450; *Railway Co. v. Smith*, 9 Wall. 95. The provisions of the act of 1850, providing for the selection of the land, have been held of no greater force than to secure an identification of the lands included in the grant, and that in effect it could not operate as a limitation upon the grant. *C. R., I. & P. Ry. Co. v. Brown*, 40 Iowa, 333. In *Railway Co. v. Smith*, 9 Wall. 95, the principal question in the case was as to the kind of evidence competent to show the character of the lands. By an act of congress land had been granted to aid in the construction of railroads in the state of Missouri, and from the grant lands granted under the act of 1850 were reserved. The case involved the identification of lands under the two acts, and the manner of doing it. To establish the reservation the swampy character of the land was to be shown. The secretary of the interior had neglected or failed to furnish the lists, and the land stood as unselected by any of the ways provided in the act. The case submits this pertinent query: "Must the state lose the land, though clearly swamp land, because that officer has neglected to do this?" The case, after referring to the difficulties under which the secretary of the interior

must labor to know the facts from which to properly certify the list, again inquires: "Why should not the same kind of testimony, subjected to cross-examination, be competent when the issue is made in a court of justice to show that they are swamp and overflowed, and so excluded from the grant under which the plaintiff claims,—a grant which was also a gratuity?" The following is the conclusion in the case: "The matter to be shown is one of observation and examination; and, whether arising before the secretary, whose duty it was primarily to decide it, or before the court whose duty it became because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose. Any other rule results in this: That, because the secretary of the interior has failed to discharge his duty in certifying these lands to the states, they, therefore, pass under a grant from which they are excepted beyond doubt; and this, when it can be proved, by testimony capable of producing the fullest conviction, that they were of the class excluded from the plaintiff's grant." The appellant seems to question the correctness of the holding in *Railway Co. v. Smith*, on authority, and refers to *French v. Fyan*, 93 U. S. 169. In that case the action was at law (ejectment). The land had been properly selected, and listed by the secretary of the interior, and a patent issued in pursuance thereof; and the plaintiff, as a grantee under the railroad grant, sought to impeach the conclusiveness of the patent by evidence showing that the land was not in fact swamp or overflowed land. The opinion attaches particular importance to the fact that the action is one at law, and holds that the evidence in such a case is not admissible, and points to a clear distinction between a case where the title following the grant has been confirmed by a compliance with the law as to selections, and a patent given by which particular tracts are specified, and one in which no selections have been

made nor patents issued. The case refers to *Railway Co. v. Smith*, and, while it says that the holding in that case was "with hesitation and with some dissent in the court," it is in no way disapproved or overruled, but rather justified by additional comments referring to the facts under which the rule was announced

Importance in argument is given to the fact that in all the cases passed upon by this court there had been some kind of selection by the state or county of the lands in question, even though there had been neglect or failure on the part of the proper officers of the United States. But we do not see how that fact changes the rule. This land being, as we have found, under the rule sanctioned in *Railway Co. v. Smith*, overflowed land, the title passed at once to the state on the passage of the act of September 28, 1850. If the plaintiff is not the owner as the grantee of the state, it must be the result of a forfeiture, and under the claim now being considered the forfeiture would result from the neglect of the state to make selection. But the act granting the land does not make the title in the state depend upon any such a duty, nor does it devolve upon the state any duty in this respect. The selections by the state, as we understand, were made in pursuance of instructions from the commissioner of the general land-office, and merely as an aid to the preparation of lists by the secretary of the interior. The fact that the state even in its own interest aided the officer of the general government to identify or select the lands belonging to it should not induce a forfeiture as the result of a mistake or oversight. The title of the state was not intended, as the grant is construed, to depend upon selections, but upon actual physical facts. The means of identification were patent to all. The railroad company took, under the grant in its aid, with knowledge of the law, and with opportunities equal to others to know facts upon which its title would depend.

Nothing in the law that we discover required the state, in order to protect its title against another and subsequent grant, which was a gratuity, to make such selections. The fact that it was swamp land, and did not belong to the railroad company is of paramount significance. The company merely took possession of and sold land to which it never had any title. The certificate of the secretary of the interior under the railway grant cannot prevail against a vested title under the grant of 1850. *Mills Co. v. Railway Co.*, 22 Iowa, 91; *Montgomery Co. v. Railway Co.*, 38 Iowa, 208.

III. The railroad company and its grantees paid taxes on the land from the year 1866 to 1888, in the aggregate sum of seventy-three dollars and fifty-three cents, and that point is urged as against the right of the plaintiff to recover. The plaintiff obtained the land from the county in September, 1888, and no taxes have ever been paid for which he was liable. During the time the taxes were paid of which complaint is made the land belonged to the county, and was exempt from taxation. *Buena Vista Co. v. Railway Co.*, 46 Iowa, 226; *Howard Co. v. Bullis*, 49 Iowa, 519. These two cases also control the question of the county being bound or estopped by the acts of its officers in the collection of taxes.

2 TAXES: mistake as to title: estoppel.

IV. The written conveyance of the land from the county to the plaintiff is as follows:

"In consideration of $1, we, J. H. Davis, James Guill and M. E. Bunting, in our official capacity as supervisors of Linn county, state of Iowa, hereby sell and convey and forever quitclaim to J. D. Hays the following described premises in Linn county, Iowa, to-wit, southwest quarter of the northwest quarter of section 19, township 85, range 8, to have and to hold the said premises unto the said J. D. Hays, his heirs and assigns forever,

3. CONVEYANCE: sale of county lands: board of supervisors.

with all and singular the appurtenances thereto belonging.

"Signed the fourth day of September, 1888.

"J. H. DAVIS,

"Chairman Board of Supervisors Linn County."

It is urged that the instrument is insufficient to pass the title, because by Code, section 305, it is provided that "no real estate shall be purchased or sold * * * without a majority of the whole board of supervisors voting therefor and consenting thereto." The following stipulation is in the record: "It is conceded that the plaintiff and the members of the board of supervisors will swear that on or about the fourth day of September, 1888, the plaintiff purchased the land in controversy from Linn county, Iowa, through the board of supervisors, for the sum of fifty dollars, which was paid at that time by the plaintiff giving his promissory note therefor, which was accepted by the board in full payment of the value and contract price." The sufficiency of the instrument of conveyance we need not discuss. It plainly appears from the record that there was between the board and the plaintiff an understanding, and such a performance by the plaintiff that he was entitled to a proper instrument of conveyance of the land, and that such a conveyance was intended. If the conveyance is insufficient it is evidently the result of a mistake, against which the law would afford relief. The title of the plaintiff is sufficient as a basis of recovery against the defendant.

V. It is lastly urged that, if the title is confirmed in the plaintiff, the taxes paid should be refunded. All the taxes were paid when the land belonged to the county, and, as he purchased the land as swamp land from the county, he had no just reason to believe there had been such payments, but, on the contrary, he had reason to believe otherwise. By the payment of the taxes the plaintiff was not relieved of a burden devolving upon him, so

4. TAXES: payment by mistake: re-imbursement.

that equity would require him to reimburse. As to the right of the defendant elsewhere we are not to consider. AFFIRMED.

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## J. L. BUDD, Appellant, v. STEPHEN KING, Assignee, Appellee.

**Assignment for Benefit of Creditors**: PARTNERSHIP ASSETS: DEBT OF INDIVIDUAL PARTNER: PROOF OF CLAIM. Where a copartnership made a general assignment of the firm and individual property for the benefit of both partnership and individual creditors, *held*, that, a claim against one of the partners which was not filed with the assignee until more than three months after the publication of notice of the assignment, would not be entitled to payment out of the assets of the individual partner in preference to the claims of the partnership creditors of which proof had been duly made, though the assets of such partner were more than sufficient to pay his individual indebtedness.

*Appeal from Harrison District Court.*—HON. G. W. WAKEFIELD, Judge.

FRIDAY, MAY 29, 1891.

THE defendant is assignee for the benefit of the creditors of Phineas Cadwell and William C. Cadwell for their individual indebtedness, and also of said parties as a partnership in carrying on two banking institutions in Harrison county. The plaintiff is the holder of certain promissory notes against Phineas Cadwell, as an individual. This action was brought against the assignee to compel the payment of said claim. There was a hearing by the court, and a decree dismissing the plaintiff's petition, and he appeals. *Affirmed.*

*J. W. Barnhart* and *H. H. Roadifer*, for appellant.

*S. I. King*, for appellee.

ROTHROCK, J.—The facts are not in dispute, and are in substance as follows: Prior to the ninth day of October, 1888, Phineas Cadwell and William C. Cadwell were in partnership, and as partners owned and carried on two banks in Harrison county. On that day they made a general assignment of all their property to the defendant except such as was exempt from execution. The partnership was insolvent, and the assignment was made for the benefit of all their creditors. The trust declared in the deed of assignment was in these words: "In trust, nevertheless, for the uses and purposes following, that is to say, to sell, dispose of, collect, recover and receive the said property, moneys and effects, and generally to convert the same into money, and after deducting the expenses of drawing and executing these presents, and the trusts hereby created, then to apply the said moneys and proceeds in and towards the payment of the debts of the parties of the first part, both as copartners and in their individual capacity, if the same be sufficient; but, if not, then ratably, and in proportion, without any preference. And the parties of the first part hereby constitute and appoint the party of the second part their attorney irrevocable, to ask, demand, collect, sue for, recover and receive the above assigned property and effects, and every part thereof."

It will be observed that the assignment was made not only for the benefit of the creditors of the partnership, but for the benefit of the individual creditors of the assignors. At that time Phineas Cadwell was indebted to the plaintiff upon the promissory notes, the amount of which is in controversy in this action. The assignee accepted the trust, and the creditors of the partnership filed their claims within the proper time, and the creditors of the individual partners did likewise, with the exception of the plaintiff. His claim was not

filed until after the expiration of three months from the publication of the notice of assignment.

It is provided by section 2126 of the Code that "all creditors who shall not exhibit their claims within the term of three months from the publication of notice as aforesaid [notice of the assignment] shall not participate in the dividends until after the payment in full of all claims presented within said term and allowed by the court." The assets of the partnership are sufficient to pay the partnership debts for which claims were duly and legally filed. But the individual assets of Phineas Cadwell are more than sufficient to pay all of his individual debts, including the claim of the plaintiff. If is claimed by the plaintiff that, notwithstanding his claim was not filed within the time required by the statute, yet he is entitled to payment from the individual assets in preference to the firm creditors. It is an elementary principle of the law that in cases of insolvency of a partnership the partnership creditors are entitled to be first paid from the proceeds of the partnership property, and the creditors of the individual members of the partnership are entitled to be first paid out of the assets of the individual member who owes the debt. *Switzer v. Smith*, 35 Iowa, 269; *Miller v. Clarke*, 37 Iowa, 325; and other cases in this court cited in 2 McClain's Digest, p. 236. This well-understood principle of the law is not questioned by counsel, and if the plaintiff had filed his claim within the three months provided by statute he would have the right to demand that his claim as against the individual estate of Phineas Cadwell should be preferred to the claims of the creditors of the partnership. As we regard the question, it is important to consider the relation which the partnership creditors sustain to the individual members of the firm. When they filed their claims, although they may have appeared as claims against the partnership, yet they were also claims against the

individual members of the firm. It cannot be claimed that the property of an individual member of the firm is exempt from the payment of partnership debts. An action may be maintained against the partnership, at the same time against the individual members of the firm, and the individual property may be levied upon and sold to pay the debt. In view of the trust created by the deed of assignment under consideration, there was no thought of withholding any part of the property, partnership or individual, from distribution among all the creditors. The law would regard the partnership claims as claims exhibited against all of the property. It seems to us that when this is conceded it is an end of the case. The statute, in express terms, allows a preference in favor of all claims filed within three months from the time of the publication of notice. The claims filed by the firm creditors cannot by any rule of construction be limited to mere claims against the partnership property.

The decree of the district court is AFFIRMED.

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FRANK RIDGLEY, Appellant, v. FRANK DEBOUGH, Appellee.

1. **Practice in Supreme Court:** EQUITY CAUSE: RECORD: TRIAL DE NOVO. Where the appellant's abstract as amended, in an equity cause, alleged that it contained all the evidence introduced, or offered to be introduced, and all objections made thereto, and rulings made thereon, *held*, that, in the absence of any denial by the appellee, it would be deemed to contain all the evidence, and to entitle the appellant to a trial *de novo*.

2. **Lease of Lands:** VALIDITY. The mother of H., being the owner of the forty acres of land in question, the taxes upon which had been paid by the latter, authorized H. to lease the land, or sell the grass thereon, and thereby reimburse himself for the payment of taxes thereon, but stated that she would rather pay the taxes herself than to have the land so leased as to prevent a sale of the land. In pursuance of such authority H. leased the land to plaintiff in March for

one year, making the lease in his own name. In the following May his mother made a contract for the sale of the land and agreed to convey all her right, title and interest therein. *Held*, that H. had a right to make a lease in his own name, and on his own behalf, and that the plaintiff was entitled thereunder to the use and occupation of the land for the term of the lease.

*Appeal from Audubon District Court.*—HON. N. W. MACEY, Judge.

FRIDAY, MAY 29, 1891.

ACTION to enjoin the defendant from the use and occupation of a forty-acre tract of land in Audubon county. The district court gave judgment for the defendant, and the plaintiff appeals.—*Reversed.*

*I. L. Statzell* and *J. M. Griggs*, for appellant.

*H. W. Hanna*, for appellee.

GRANGER, J.—I. Appellee objects to the trial of the cause *de novo* because the abstract does not purport to be one "of all the evidence." The abstract, as amended, shows that it contains all the evidence introduced, or offered to be introduced, and all objections made thereto, and rulings made thereon. The appellee files no abstract putting in issue the statement, and it is sufficient.

1. PRACTICE in the supreme court: equity cause: trial de novo.

II. On the twenty-third day of March, 1888, Lavina Hanna, residing at Cedar Rapids, Iowa, was the owner of the forty acres of land in question. On that day a written lease of the land for one year was made to the plaintiff, to which the name of H. W. Hanna appears as lessor. On the twelfth day of May, 1888, Lavina Hanna entered into a written contract with the defendant for the sale of the land for four hundred and forty dollars, with a payment of seventy-five dollars in hand, and the

2. LEASE of lands: validity.

balance in installments, the last to become due May 12, 1893. Upon performance by the defendant, Lavina Hanna agreed, in effect, to convey to him all her "rights, title and interest in and to the real estate." The right of possession during the period of performance by the defendant is left entirely to legal inference. It is not in terms given to the defendant by the contract. These contracts constitute the basis of the respective claims of the parties to the use and occupancy of the land. The defendant, being a herdsman, insisted upon a right to pasture the land, and at the instance of the plaintiff an injunction issued to restrain him. The case may be said to turn upon the validity of the contract or lease of the land to the plaintiff. As before said, the lease has to it the name of H. W. Hanna as lessor, and it is insisted that the name is there without authority, and that hence the contract is without effect. H. W. Hanna is a son of Lavina Hanna, and resides in Audubon county. His mother formerly resided there, but moved, some four years ago, to Cedar Rapids. During this time she has owned the land, and from the testimony of H. W. Hanna for the defendant it appears that since his mother left Audubon county he has on his own account paid the taxes for her on the land; that he was at Cedar Rapids the winter before, and his mother said she did not like to have him pay the taxes, and asked him if he could not get enough out of the grass from the land to pay the taxes, so that he would not have them to pay; and he told her he thought he could; that it would rent for that, but would injure the sale of it; and she said she did't want him to do anything to "avoid the sale," as she wanted the money as soon as she could get it. On cross-examination Mr. Hanna said: "My mother left here about four years ago, and has not been here since. She lives at Cedar Rapids. I told Ridgley he could have the use of the land for the taxes. After the lease

was made it was deposited in my safe, and then afterwards Mr. Ridgley paid me fifty cents in money, being the balance due on the rent. Received this fifty cents after the land was sold to DeBough. I had been paying her taxes and sent her the receipts, ever since we had owned this land, and she said she didn't think I ought to be paying her taxes without getting some benefit from it. I told her I didn't see how I could get enough for it without I leased the land or sold the grass; she asked me if that could not be done, and I told her it probably could, but it might affect a sale if it were leased out for a year, and she said she would rather pay the taxes herself than to have land leased so it would prevent a sale being made." Mrs. Hanna was not a witness, and her son's is the only testimony from which we may know his understanding with his mother as to his right to lease, or so use the grass on the land as to pay the taxes. The facts as to the making of the lease are about as follows: Mr. Moore was the clerk for Mr. Hanna, who is an attorney at law. The plaintiff saw Mr. Hanna on the day the lease was made, and they had some talk about the lease, and Hanna, being called away by sickness in his family, directed his clerk to draw up a lease. The rental value of the land was to be the amount of the taxes for the year. The amount was that day ascertained to be six dollars and forty cents and the plaintiff paid Mr. Moore five dollars and ninety cents, for which Moore gave the receipt of Mr. Hanna, and afterwards, May 30, 1888, plaintiff paid the remaining fifty cents to Mr. Hanna. The money was applied in payment of the taxes. Mr. Moore signed the name "H. W. Hanna" to the lease, and the plaintiff attached his signature. The lease is silent as to any forfeiture in case of a sale, and is for the period of one year. The value of the land for rent that year consisted entirely of the grass thereon for hay or pasturage. Mr. Hanna, in his testimony, says

that he told the plaintiff that his lease must be subject to a right to sell the land; that he "would not prevent its being sold on account of the lease." He also says in his direct evidence: "In case the land should be sold the agreement was rather indefinite. I told him that we would have no trouble in relation to that part of it." These statements are denied by the plaintiff.

It may be well to first settle the point as to Mr. Hanna's authority to deal with the land. It seems to us from the statements and conduct of Mr. Hanna that he understood that he had the right to so use the land that the grass thereon, for hay or pasturage, should save him from the payment of taxes. This he might do by selling the grass or leasing the land. There is nothing to show that his mother had not the same understanding. It is important to keep this fact in view: That between Mrs. and Mr. Hanna both understood that Mr. Hanna assumed the burden of paying the taxes, and he was to use the land to save him therefrom. The case does not involve a question of agency. The grass was not to be sold or the land leased for her, but for him. In so doing she desired him to so use it as not to prevent a sale. This, we think, was a matter that she confided to his judgment. It would be a harsh construction of his authority in such a case to say: "If he had sold to A the grass on the land for that year for hay for the payment of taxes due, and A paid them, and afterwards, before the haying season Mrs. Hanna sells the land, that A forfeits his right because of a want of authority in Mr. Hanna to so contract. In other words, that the sale would be void as without authority." With our view of the facts, Mr. Hanna had the right to make the contract in his own name and on his own behalf. It appears to us that this must have been the idea of Mr. Hanna as to his authority to use the land, for on the morning after the lease was made Mr. Moore told him the lease was in the safe, and that the money

paid had been applied on the taxes. Hanna then knew there was a lease executed, and that Moore must have acted for the lessor. Moore was Hanna's agent, but not that of his mother. Hanna did not then dispute the right of Moore to execute the lease on behalf of some one, or even stop to know its contents. Assuming, then, as we must, an authority of Moore to act we can only assume his authority to act for Mr. Hanna. This disposes of the much controverted point in the case as to the authority of Mr. Hanna as an agent to bind his mother by the execution of the lease, for it is his lease, and not hers.

The equities of the case are strongly in favor of the plaintiff. He leased the land in good faith and paid the rent. There is no claim that the rent paid was not adequate. It was the same that the defendant had before paid for the use of the land. The claim that it was paid to be forfeited if the land was sold is so unusual, and such a contract is so wanting in mutual benefits, as to awaken doubts where the proof is not strong in its support. With the proper issues to reform the contract the testimony would be entirely insufficient. The defendant made this contract of purchase with knowledge of the plaintiff's claim, and has no equities in his favor as an innocent purchaser.

There should be a decree for the plaintiff, with costs, and the cause is remanded for that purpose. REVERSED.

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## JOHN O'CONNOR, Appellee, v. ILLINOIS CENTRAL RAILWAY COMPANY, Appellant.

1. **Master and Servant:** DEFECTIVE MACHINERY: KNOWLEDGE OF EMPLOYER: NEGLIGENCE: PLEADING. In an action by an employe of a railroad company for damages for injuries sustained in being thrown from a freight car alleged to be so defectively constructed that it would not turn a curve, an allegation that the plaintiff's injury

was caused wholly by the defendant's negligently using and permitting to be used the car so defectively constructed sufficiently charges negligence on the part of the defendant, although such negligence could only be proven by showing that the defendant had either actual or constructive knowledge of the defect.

2. ———: ———: NEGLIGENCE: EVIDENCE. The only evidence that the car complained of by the plaintiff was defective was, that while the same was being moved by pushing the car ahead of an engine over the defendant's track it was derailed on a curve. On the other hand it appeared that the car was carefully examined by the defendant's car inspector the day before the accident, and by the car inspector and the foreman of the engine house the day after the accident, and found each time to be in perfect order. It further appeared that the truck used with the car in question was in general use in six states, and is used by many of the leading railroads of the country acceptably. *Held*, that a verdict for the plaintiff was not supported by the evidence.

*Appeal from Woodbury District Court.*—HON. G. W. WAKEFIELD, Judge.

FRIDAY, MAY 29, 1891.

THIS is an action to recover damages for a personal injury. There was a judgment for plaintiff, and the defendant appeals.—*Reversed.*

*J. F. Duncombe*, for appellant.

*J. N. Weaver*, for appellee.

GRANGER, J.—In January, 1889, the plaintiff was in the employ of the defendant company engaged in switching cars to and from the Union stock yards and the pork and beef packing houses in and about the city. On the fourteenth day of that month the defendant company was moving a Chicago refrigerator car by pushing the same ahead of an engine from the transfer track of the company over the Union stock-yards track to the Silberhorn packing house, when the car was derailed on a curve of the track, and

1. MASTER and servant: defective machinery: knowledge of employer: negligence: pleading.

the plaintiff, being on the car, was thrown therefrom, and injured. The allegations of the petition showing the negligence of the defendant are as follows:

"That said refrigerator car on which plaintiff was so riding was so defectively constructed in its trucks and running gear that it would not turn a curve on the defendant's said railroad tracks, and when at or about the point above mentioned, and being so removed, said car, on account of said defective construction, jumped the track, and became derailed, whereby plaintiff was thrown from the top of said car to the ground with great force and violence, inflicting upon plaintiff serious and permanent injuries," etc. "That said injury to plaintiff was caused wholly by the defendant's negligently using and permitting to be used said car so defectively constructed, and through no fault of plaintiff, by reason of all which plaintiff has been damaged to the sum of five thousand dollars, no part of which has been paid."

After verdict, the defendant moved in arrest of judgment as follows:

"*First.* As grounds in arrest of judgment the defendant says that the petition in this case is defective and does not show a cause of action, in that it does not state that the defect in the construction of the running gear and trucks of the car from which the plaintiff is alleged to have fallen was known to the defendant, or might have been known to the defendant by the exercise of ordinary care. *Second.* The petition does not allege that the defendant had knowledge or notice of the negligence complained of, either actual or constructive."

A motion in arrest of judgment is available only when "the facts stated by the petition do not entitle the plaintiff to any relief whatever." Code, sec. 2650. A correct test of the sufficiency of the petition to entitle the plaintiff to any relief is to admit the facts

pleaded, and to determine the law applicable thereto. Applying the test to this case, we have these facts: The refrigerator car was so defective in its running gear that it would not turn a curve on the defendant's road; that on account of such defective construction it became derailed, and the plaintiff, without fault on his part, was thereby injured; and that the injury was caused by the company negligently using or permitting to be used the car so defectively constructed. The averments are to this effect: That the defendant, by negligently using a defective car, injured the plaintiff without his fault. Under the law, a party is liable for injuries resulting from his negligence to which the other party does not contribute. The plaintiff has in general terms averred negligence in the use of the car. Such negligence could only be proven by showing the knowledge, "actual or constructive," which the appellant claims should be alleged. The allegation claimed would only make the petition more specific. If stated in the petition, nothing more than negligence would be pleaded. The facts there stated as grounds for the motion go rather to the form or manner of pleading negligence than to its substance or the ultimate fact, and a motion in arrest is not available in such cases. *District Township of Coon v. Directors District Township of Providence*, 52 Iowa, 287; *Edgerly v. Insurance Co.*, 43 Iowa, 587.

II. It is next urged that the verdict is without support in the evidence. The car in question is one of a series of sixty-three in number, manufactured by the LaFayette car works for the Chicago Refrigerator Car Company in October, November and December, 1888, and is numbered 11057. It was delivered to the defendant company in December, 1888, and by that company taken to Sioux City, Iowa, and went over the track and around the curve where it was afterwards derailed,

2. —: —: negligence: evidence.

loaded at the packing-house, and back over the track to the company's line, and thence to Chicago, and was again taken to Sioux City on the eleventh of January, 1889. On the thirteenth of January—the day before the accident—the car was examined by the car inspector for the company, and the car found to be in perfect order. Mr. Swift, the car inspector, says:

"I looked it all over carefully and particularly. I examined the trucks and running gear. I looked at the wheels, and looked at the truck, and all over it, to see that the bolts were all right, and the drawheads, everything that was in view. * * * The next morning I saw it,—the fifteenth. She was sitting on the sidetrack there, by the engine-house, in the yard. It was brought back to the yard. I looked it over, and found the side bearing gone on the bolster. I jacked it up, so I could see the center plates. Raised the car up off the track, so I could see the center pin. I did it to see if there was anything wrong with the center pin,—whether there was anything in there,—and I always do; and another thing was to get my side bearing on,—to get my bolts in. I carefully examined these center plates, and the various parts of these trucks, and put my hand in to see if there was any dirt or stones or pieces of iron. These center plates were in plain view after the car was jacked up, and I looked at them. There was nothing the least the matter of them. I examined both trucks and center plates. I didn't jack up the other end because it worked all right. The one end that was skewed around was the one that I examined, where the little piece of iron was off the car. Nothing wrong with the truck. Nothing wrong with the running gear, except the loss of this little piece. I tried the wheels. Gauged the wheels. They were all in perfect order. The gauge is a stick that we have to try wheels with, the same gauge that is used on the tracks. The car had never been

there before for repairs. I examined it before. I should judge about a month before. I found it in perfect order, as far as I could see. I made a perfect examination of it at that time. There was nothing the matter of the running gear or trucks that I could discover.

Cross-examination: I am the car-repairer. I have never had any other experience with any other of these refrigerator cars in Sioux City only in the draw-bar line, or something of that sort. *Q.* Didn't you receive orders to send some of them to Waterloo on account of their not keeping track? *A.* That was afterwards. I examined the car in the yard, and it was in perfect good condition, as far as I could see. I considered it in first-class. It was in perfect good condition the day before this accident, and it was in perfect good condition the day afterwards. I replaced a side casting. That was all that was wrong about that car, as far as I could see; that was all there was wrong. I jacked this car up in the yard after the accident. Didn't before the accident. I had no occasion to."

Mr. Bryant, foreman of the engine-house, also examined the car with Mr. Swift after the accident, and testifies that there was not anything to indicate that it was not in perfect condition. The trucks used with this car are in general use in Illinois, Wisconsin, Iowa, Minnesota, Nebraska and Missouri, and are used by many of the leading railways of the country acceptably. The record is in fact an affirmative showing in favor of that make of cars. It is a significant fact in this case, and of quite controlling importance, that no particular defect has ever been found in the car in question. In this respect this case differs from the generality of this class of cases before us. Generally the defect or cause of the accident is known at the time of the trial,—as a defective coupling or hand-piece, a broken axle or wheel, some particular fact to which the

accident can be attributed, and the fact of negligence in regard thereto determined. Barring the fact that the car did mount the track at this particular point on the day of the accident, and the day following, and all the evidence shows the car to have been in good condition, without defect; and, further, that the company had been diligent to know its condition. Take from the record the fact of the derailments, and nothing would be left to cast a suspicion against the actual condition of the car or the conduct of the company to know its condition. If the accident had disclosed a defect in the car, that fact might have tended to show that the inspector came short of his duty. But the subsequent inspection substantiates the former, and the car, after the accident, so far as an inspection could show, was then in good condition. Hence, the simple fact of derailment stands as the only evidence of negligence. If that simple fact could, in law, be sufficient to show negligence, it is conclusively overborne by an affirmative showing that the car in the particular as to which it is alleged to be defective was not so, at least, in a manner that it was ascertainable; and there could be no claim that more was required of defendant than diligence to know if the car was serviceable. That the mere happening of the derailment or the accident would not show negligence, see *Baldwin v. Railway Co.*, 68 Iowa, 37; *Case v. Railway Co.*, 64 Iowa, 762; *Gandy v. Railway Co.*, 30 Iowa, 420. In fact this rule is conceded by the appellee. The nearest that the appellee comes to an attempt to point out evidence from which a defective truck or running gear could be found is that Swift, the car inspector, made report to Bryant, the foreman of the engine-house, who made a report to the master mechanic, as to this car after the accident. Orders were afterwards received from the master mechanic to "try the gauge" on the refrigerator company's cars, and it was found that some of them varied about a fourth of an inch, and they were marked

and sent to Waterloo, but returned without change. But the car in question was not one of them; and the evidence shows without dispute that the gauge of this car was tried and found correct before and after the accident. The appellee assumes that because of this order to try the gauge of that class of cars there must have been a difference between the report made to the master mechanic and the testimony of Swift and Bryant on the stand, but the assumption is without support, and will not do as a fact on which to base negligence. It is also said that other cars passed over this same track without derailment, which is true. It is also true that this car on two occasions mounted the track at this particular place, while it was operated both before and after the accident, on curves and other places, without mishap. The most that can be said for the appellee is that this car, at this particular place, from some unknown cause, became derailed, and caused the injury to the plaintiff. But that is not what the appellee needs. He needs some known facts, having support in the evidence, from which negligence may be found. We think the verdict is without support in the evidence.

Other questions presented it is not important to consider, and the judgment is REVERSED.

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# THE STATE OF IOWA, Appellee, v. FRED M. HULL, Appellant.

1. **Practice in Supreme Court:** RECORD: AMENDED ABSTRACT: MOTION TO STRIKE. Where the appellant's abstract fairly presents the record in a cause, an amended abstract filed by the appellee which is shown to be unnecessary, and which presents the evidence by question and answer at length, will on motion be stricken from the files.

2. **Arson:** INDICTMENT: DUPLICITY. Where an indictment charged that the defendant caused to be set fire to and burned a large amount of combustible material, with the intention to cause a certain described

store building to be burned, and did then and there in the manner and at the time and place aforesaid set fire to, and cause to be burned, in the night time, the said store building, *held*, that the charge as to the actual burning must be regarded as an allegation of evidence to be treated as surplusage, and that the indictment was not, therefore, bad for duplicity.

3. ———: EVIDENCE. The premises set on fire being the property of the defendant, *held*, that certain drafts, drawn by the defendant partly before and in part after the fire, and evidencing an indebtedness that existed mostly at the time of the fire, were properly admitted on behalf of the state for the purpose of showing the defendant's financial condition at the time of the fire.

4. ———: ———. A set of duplicate keys to the burnt building, which were missing, being found upon search in the vault of an outhouse, the state claimed that they were put there by the defendant, while the defendant claimed that they were placed there by a detective who was working against him, and who directed the search. *Held*, that it was competent to rebut the defendant's claim by the introduction in evidence of an affidavit of the county attorney, upon which a search warrant was issued, and under which search was being made when the keys were found.

*Appeal from Lyon District Court.*—HON. GEORGE W. WAKEFIELD, Judge.

FRIDAY, MAY 29, 1891.

THE defendant was tried, found "guilty as charged," and sentenced to be confined in the penitentiary for a term of three years, upon an indictment charging as follows: "The said Fred M. Hull, on or about the twenty-seventh day of November, in the year of our Lord one thousand eight hundred and eighty-nine, in the county and state aforesaid, in a certain store building of I. R. Hull & Co., situate on the east twenty-two feet of the west forty-four feet of lots 1, 2 and 3, in block 15, in the town of Rock Rapids, Iowa, did wilfully, maliciously and feloniously, in the night time, cause to be set fire to, and burned, a large amount of excelsior, burlap and other combustible material to the grandjurors unknown, with the wilful, malicious and felonious intent then and there, in the

manner and at the time and place aforesaid, to cause to be burned the said store building aforesaid of I. R. Hull & Co., and did then and there, as aforesaid, in the manner and at the time and place aforesaid, wilfully, maliciously and feloniously set fire to and cause to be burned in the night time, at the time and place aforesaid, the said aforesaid store building of I. R. Hull & Co., said store building being of the value of fifteen hundred dollars." The defendant appeals from this judgment, assigning and urging in argument as errors the several matters hereinafter considered.—*Affirmed.*

*J. M. Parsons*, for appellant.

*John Y. Stone*, Attorney General, and *H. G. McMillen*, for the State.

GIVEN, J.—I. The county attorney filed an amended abstract on behalf of the appellee covering ninety-four pages, which he certifies, in connection with the appellant's abstract, fully presents the case. The appellant denies the correctness of the amended abstract, and moves to strike it from the files because useless, and not filed in time. We have, with considerable labor, compared the abstracts with each other, and with the transcript furnished by the appellant, and reach the conclusion that the appellant's abstract fully and fairly presents the case, and that the appellee's amendment was unnecessary. Another objection to the amended abstract, though not urged by the appellant, may be noticed by the court. It is that the so-called "amended abstract" is not in fact an abstract, but largely a transcript of the testimony by questions and answers at length. We recognize the necessity and advantage of, at times, setting out questions and answers as to some particular point that cannot be otherwise more concisely or plainly presented. While the county

1. PRACTICE in supreme court: record: amended abstract: motion to strike.

attorney claims that his abstract is within this necessity, we think he has gone beyond it, and necessitated the reading of many pages of questions and answers that could have been abstracted into a few pages with equal clearness. The appellant's motion to strike the amended abstract is sustained, but in view of the denials we have referred to the transcript in the consideration of the case.

II. Following the order pursued in the arguments, we first notice the appellant's contention that, although it was unnecessary to allege the location of the store building except that it was in the county, the state, having alleged its precise location as to lot and block, was bound to prove the location as alleged, and that no proof of such location was made. We think there is evidence from which the jury might find that the building was located as alleged, and do not, therefore, determine whether it was incumbent on the state to make such proofs.

III. One ground of the appellant's motion in arrest of judgment, and for a new trial, is that the indictment is bad for duplicity, in that it charges the crime of wilfully and maliciously burning a store, as defined in section 3884, and also the crime of setting fire to material with intent to cause the store to be burned, as defined in section 3885 of the Code. It is unquestioned that the indictment must charge but one offense. Code, sec. 4300. The contention is whether the indictment, considered as a whole, does charge both these offenses. Taking that part of the charge ending with the words, "I. R. Hull & Co.," immediately preceding the words, "and did then and there," alone, and we have a complete charge of setting fire to material with intent to burn the store building described, and taking what follows alone we have a charge of wilfully and maliciously burning the store building. The whole

2. ARSON: indictment: duplicity.

charge, considered together, does not, in our opinion, charge two offenses. What is charged as to an actual burning must be regarded as an allegation of evidence, —a statement of a fact, evidencing the intent to burn previously charged,—and may be treated as surplusage. *State v. Hayden*, 45 Iowa, 11, is directly in point. In that case the charge was of breaking and entering a store building wherein valuable merchandise was kept for sale, with intent to steal said goods, and that he did steal certain articles named. The allegation that he did steal was held to be a statement of evidence, and surplusage. "The instruction of the court, the verdict of the jury, and the judgment show that the crime for which the defendant was charged and tried was not larceny, but the breaking and entering the store with intent to commit larceny." Such is the record in this case. The instructions, verdict and judgment show that the appellant was tried, without objection on his part, for the crime of setting fire to material with intent to burn the store, and not for the crime of burning it. No objection was made to being so tried, nor to the indictment, until made in the motion in arrest of judgment and for a new trial. *State v. Hayden* has been approved and followed in *State v. Shaffer*, 59 Iowa, 290; *State v. Ormiston*, 66 Iowa, 143, and *State v. Ridley*, 48 Iowa, 370. In the latter case it was held, upon a similar indictment to that in the *Case of Hayden*, that the court erred in putting the defendant on trial for larceny. In *State v. McFarland*, 49 Iowa, 99, and *State v. Kennedy*, 63 Iowa, 197, the indictments were in two counts, charging different offenses, and were, therefore, held bad for duplicity; but in this there is but one count, which, taken as a whole, charges but one offense, to-wit, setting fire to material with intent to burn the store building described.

IV. The state, for the purpose of showing the defendant's financial condition at the time of the fire,

3. —: evidence. offered certain drafts, drawn before and after the fire, which were admitted, over the appellant's objection. The appellant's testimony tended to show that most, if not all, of the indebtedness evidenced by these drafts existed at the time of the fire. We see no error, therefore, in admitting them in evidence.

V. A set of duplicate keys to the burned building was missing, and upon search was found in the vault of an outhouse. The state claimed that

4. —: —. the defendant put them there, and the defendant claimed that they were put there by a detective, who was working against him, and who directed the search. To rebut the defendant's claim, the state introduced, over the defendant's objection, an affidavit of the county attorney, upon which a search-warrant was issued, and under which search was being made when the keys were found. In view of the claims of the defendant, there was no error in admitting this affidavit for the purpose of showing why the search was being made.

V. The only remaining contention urged by the appellant is that the testimony is not sufficient to support the verdict. We have examined the testimony as set out in the transcript, with care, and, although it is conflicting upon many points, and open to much of the criticism made upon it, we are of the opinion that it amply supports the verdict.

Our conclusion, upon the whole record, is that the judgment of the district court should be AFFIRMED.

# THE STATE OF IOWA, Appellee, v. CHARLES ZIMMERMAN, Appellant.

**Indictment:** LIQUOR NUISANCE: SECOND CONVICTION: PLEADING. Where an indictment for the crime of nuisance, as defined in section 1543 of the Code, further charged that the defendant "was, on the twenty-sixth day of September, 1888, convicted of the crime of nuisance, in the district court of Marshall county, Iowa," *held*, that the indictment sufficiently alleged a former conviction of the same kind of nuisance as that for which he was then indicted; and that, by his plea of guilty, the defendant not only confessed himself as guilty of keeping a nuisance, as charged, but that he had formerly been convicted of keeping the same kind of nuisance, and warranted his commitment to the county jail, as provided by section 9, chapter 66, of the Acts of the Twenty-first General Assembly.

*Appeal from Marshall District Court.*—HON. J. L. STEVENS, Judge.

FRIDAY, MAY 29, 1891.

THIS is an appeal by Charles Zimmerman from an order of Hon. D. R. HINDMAN, judge of the eleventh judicial district, in a proceeding on *habeas corpus*, remanding the appellant to custody.—*Affirmed.*

*J. M. Parker*, for appellant.

*John Y. Stone*, Attorney General, for the State.

GIVEN, J.—April 16, 1889, the appellant was charged by indictment, in the usual form, with the crime of nuisance, as defined in section 1543 of the Code. The indictment contains the additional charge that he "was, on the twenty-sixth day of September, 1888, convicted of the crime of nuisance, in the district court of Marshall county, Iowa." On April 18, 1889, the appellant pleaded guilty to this indictment, and was

adjudged by the court to be confined in the jail of Marshall county, Iowa, for the period of five months. A warrant of commitment was issued on this judgment to the sheriff, and on the eighteenth day of April, 1889, he took the appellant into custody, and detained him in the jail of the county. The appellant petitioned Hon. D. R. HINDMAN, judge, for a writ of *habeas corpus*, alleging that his detention was illegal, because the district court had no authority to enter the judgment that it did against him, for the reason that the indictment did not charge a former conviction "of keeping a nuisance under the laws prohibiting the illegal sale of intoxicating liquors," and because the former case was then pending in this court on appeal. The writ was granted, and upon full hearing the appellant was remanded into custody of the sheriff, to be detained and kept as provided by the judgment and warrant of commitment, from which order this appeal is taken.

Section 3483 of the Code, under title "Of *habeas corpus*," is as follows: "But it is not permissible to question the correctness of the action of the grand jury in finding a bill of indictment, or of the trial jury in trial of a cause, nor of a court or judge when acting within their legitimate province and in a lawful manner." Our inquiry is whether the district court acted within its legitimate province, and in a lawful manner, in entering the judgment that it did against the appellant.

It is not questioned but that the judgment was authorized if the appellant was amenable to the penalties prescribed in section 9, chapter 66, of the Acts of the Twenty-first General Assembly, which provides a penalty of imprisonment in the county jail of not less than three months nor more than one year upon a second conviction "of keeping a nuisance under the laws prohibiting the illegal sale of intoxicating liquors." The appellant's contention is that the former convic-

tion must be charged in the indictment, and that the charge in this indictment is too indefinite and uncertain, for that it alleges a former conviction of nuisance, but not of the kind of nuisance defined in said section 9. *Commonwealth v. Harrington*, 130 Mass. 35, is cited in support of the claim that the former conviction must be charged. We do not determine this question, as we are of the opinion that the indictment, construed by the rules of our statute, does charge a former conviction of keeping a nuisance under the law prohibiting the illegal sale of intoxicating liquors with sufficient particularity. By his plea the appellant confessed himself not only guilty of the charge of keeping a nuisance as charged, but that he had formerly been convicted of keeping the same kind of a nuisance. It was upon this confession of guilt that the judgment was pronounced. There was no denial of the charge of former conviction, and no showing that it had been appealed from, but, on the contrary, it was confessed. The court was clearly acting within its legitimate province, and in a lawful manner, in pronouncing the judgment it did. The detention of the appellant under this judgment, and the warrant issued thereon, was not illegal. The order remanding him to custody is, therefore, AFFIRMED.

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# EVELINE BIGELOW, Appellant, v. ROLLIN BURNHAM, Appellee.

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**Promissory Note:** PLACE OF PAYMENT: USURY. Where a promissory note purported on its face to have been made in Iowa, but the evidence showed that it was in fact made and delivered in the state of New York, where the payee resided, *held*, that in the absence of evidence as to where the indebtedness for which the note was given was incurred, or where the consideration therefor was delivered, or of any agreement, as to the place of payment, it must be presumed to be payable in Iowa, and, being valid under the laws of that state, it would not be held void because the rate of interest provided therein is usurious under the laws of the state of New York.

*Appeal from Buena Vista District Court.*—HON. LOT THOMAS, Judge.

FRIDAY, MAY 29, 1891.

ACTION on a promissory note. There was a verdict, under the direction of the court, for the defendant. The plaintiff appeals.—*Reversed.*

*Nagle & Birdsall* and *T. D. Higgs*, for appellant.

*C. A. Irwin* and *Wm. Milchrist*, for appellee.

BECK, C. J. The promissory note is in the following language:

"STORM LAKE, BUENA VISTA CO., IOWA.

"For value received I promise to pay Rufus Burnham or bearer eighteen hundred and fifty-eight dollars and sixty-three cents, within one year from date, with interest at seven per cent. May 2, 1885.

"ROLLIN BURNHAM."

The answer of the defendant admits the execution of the note in suit, but alleges that it was executed and delivered in the state of New York, and that under the laws of that state it is usurious and void. The statutes of New York declare that all notes and other contracts, providing for the payment of interest at a rate greater than six per centum per annum, shall be void. The evidence shows that the note in suit was signed in New York, and delivered there, and that the plaintiff at the time, and both prior and subsequently thereto, resided, and still does reside, in Storm Lake, in this state, and the payee of the note resided in New York. It is not shown where the indebtedness was incurred for which the note was given, nor where the consideration therefor was delivered to and received by the plaintiff, nor was there any evidence showing an agreement for

the payment of the note at any specified place. The only facts upon which the case was decided are that the note was executed in New York, and that the payee resided in that state.

II. It is a settled rule that the law of the place where a contract or a note by its terms is to be performed determines the question of its validity. *Butters v. Olds*, 11 Iowa, 1; *Arnold v. Potter*, 22 Iowa, 194; *Burrows v. Stryker*, 47 Iowa, 477; Story on Conflict of Laws, secs. 242, 280, 281; *Andrews v. Pond*, 13 Pet. 65; 2 Parsons on Notes & Bills, 320.

III. The date and place of execution of a promissory note, which appear on its face, and not by mere memorandum entered thereon, raise the presumption that it is payable at that place. The reason of this rule is based upon the fact that the mention of the place is always intended to show that the note was executed there, just as the entry of the date is intended to show the day of execution. In business affairs, and the general affairs of life, the date of an instrument, and the place named in connection with the date, are written thereon, in order to show the day and place of its execution. The law will raise a presumption in accord with this uniform custom of men generally. The place named in a promissory note as the place of execution is usually the place of residence or business of the maker of the paper, and is embodied in the note to show where it may be presented for payment. It follows that the law raises a presumption upon the face of the note of an agreement that it is payable at the place indicated as the place of its execution, and permits it to be enforced under the law prevailing there. 1 Parsons on Notes & Bills [1 Ed.] 441, 442; *Bullard v. Thompson*, 35 Tex. 313; *Orcutt v. Hough*, 54 N. H. 472; *Ricketts v. Pendleton*, 14 Md. 320.

IV. It will not do to presume that the parties entered into a contract, which is void under the laws of

New York, and that they intended that it should be subject thereto. Such presumption would charge them with the folly or the fraud of entering, with their eyes open, into a void contract. Men are not presumed by the law to act in folly or in dishonesty, but rather that they intended in good faith that their acts shall be valid, and what they purport to be. Nor will we by presumption bring the case under the usury law of New York, which is penal in its effects. *Bullard v. Thompson*, 35 Tex. 313; *Thompson v. Powles*, 2 Sim. 194.

V. When a contract is made in one state, to be performed in another, and in express terms provides for a rate of interest lawful in one, but unlawful in the other state, the parties will be presumed to contract with reference to the laws of the state wherein the stipulated rate of interest is lawful, and such presumption will prevail until overcome by proof that the stipulation was intended as a means to defeat the law against usury, and to support a contract otherwise usurious. If it be a *bona fide* transaction the contract will be sustained; if a device for securing usurious interest it will be held invalid. *Scott v. Perlee*, 39 Ohio St. 63; *Newman v. Kershaw*, 10 Wis. 333; *Fisher v. Otis*, 3 Chand. (Wis.) 83; *Richards v. Bank*, 12 Wis. 692; *Hosford v. Nichols*, 1 Paige, 220; *Pratt v. Adams*, 7 Paige, 615; *Fanning v. Consequa*, 17 Johns. 511; *Townsend v. Riley*, 46 N. H. 300; *Arnold v. Potter*, 22 Iowa, 194; *Butters v. Olds*, 11 Iowa, 1. See note to *Martin v. Johnson*, 8 Lawyer's Rep. Ann. 170; 10 S .E. Rep. 1092.

VI. It appears that the rule as to the law of contracts, made in one state to be performed in another, is modified or softened when applied to contracts for interest, so that the intentions of the parties are effectuated, as a concession to trade and commerce. See Daniels on Negotiable Instruments, sec. 922, and cases cited; 2 Parsons on Contracts, sec. 5, p. 94, and cases

cited. *Hart v. Wills*, 52 Iowa, 56, is not in conflict with our conclusions in this case, the note in that case being held to be an Iowa contract upon grounds not inconsistent with our decision in this case.

On the ground that the note upon its face will be presumed to be payable in Iowa, and in accord with other doctrines stated, we reach the conclusion that the judgment of the district court ought to be REVERSED.

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## CEDAR RAPIDS INSURANCE COMPANY, Appellee, v. WILLIAM BUTLER *et al.*, Appellants.

1. **Corporations**: SUBSCRIPTION TO STOCK: FRAUD: LACHES: RELIEF. The defendants were induced, through the misrepresentations of the general agent of the plaintiff company, to purchase certain shares of its stock. Soon after the defendants acquired knowledge of the fraudulent character of the representations made to them, the company decided to reinsure its risks, and retire from business, and the defendants allowed the settlement of the company's business to proceed for nearly four years with the knowledge that they appeared to be stockholders, and that a note and mortgage given in consideration of their stock were apparently valid obligations. They expressed dissatisfaction with the manner in which they had been treated, and a desire to get rid of their stock, and secure the return of said note and mortgage, but at no time made an unequivocal attempt to rescind their contract of membership in the company. *Held*, in an action brought by the company upon said note and mortgage, that conceding that the representations made to the defendants would have entitled them to a rescission of their contract of purchase had they acted with diligence, they were not now entitled to such relief.

2. **Pleading**: PRACTICE IN SUPREME COURT. The defense of laches was not interposed to the defendants' claim for a rescission of their contract by reply to the defendant's answer, but no objection having been raised to its consideration in the district court, *held*, that it could not be raised for the first time in the supreme court.

*Appeal from Page District Court.*—HON. H. E. DEEMER, Judge.

FRIDAY, MAY 29, 1891.

ACTION in equity to recover the amount of a promissory note, and for the foreclosure of a mortgage given to secure its payment. There was a trial by the court, and a decree in favor of the plaintiff as prayed. The defendants appeal.—*Modified and affirmed.*

*W. W. Morsman*, for appellants.

*Harl & McCabe*, for appellee.

ROBINSON, J.—The plaintiff is a corporation, organized in the year 1878, for the purpose of doing an insurance business. Its authorized capital stock was one hundred thousand dollars, of which one-fourth was paid up. In December, 1880, the authorized capital stock was increased to two hundred thousand dollars. One-fourth of the increase was paid for, and certificates for the full amount authorized were issued to the stockholders who had made the payments thereon. In September, 1881, and for some time thereafter, one W. G. Albright was an agent of the plaintiff. There seems to be some conflict in the evidence as to the powers he was authorized to exercise, but for the purpose of this case he must be held to have been a general agent. In the month named an arrangement was made by which he was authorized to sell for the stockholders one hundred and fifty thousand dollars of the stock they held at a premium of twenty-five per cent. He was to be paid by the company for his services in making such sales, and one-fifth of the premium received was to be paid into the treasury of the company. Acting under that arrangement, Albright secured from certain residents of Clarinda subscriptions to the stock of the company in considerable amounts. Among the persons who so subscribed were the defendants, William and Jacob Butler, who, as partners, took twenty shares of one

1. CORPORATIONS: subscription to stock: fraud: laches: relief.

hundred dollars each, for which they agreed to pay twenty-five hundred dollars. To pay for such shares the defendants named made to the plaintiff the note in suit for twenty-five hundred dollars, and the mortgage, the foreclosure of which is demanded. In December, 1882, the stock of the company was reduced to one hundred thousand dollars, the stock taken by the Butlers was reduced one-half, and credits for that reduction to the amount of one thousand dollars were indorsed on the note. The business of the company did not prosper, and in December, 1884, it decided to reinsure its risks, and retire from business; and since that time it has not been taking risks, but has been settling and closing its business. This action was commenced in August, 1888, and is against William and Jacob Butler and their wives. The appellants claim that the note and mortgage in suit were obtained by fraud, and demand their surrender, and tender to the plaintiff the certificate of stock in controversy.

It is not necessary to specify in detail the inducements held out by Albright to secure the subscriptions made by the Butlers. It is sufficient to say that the real nature of the transaction was concealed from them; that they were led to believe that the stock for which they subscribed had never been issued, and that they were dealing only with the company; that by reason of an alleged surplus the stock was actually worth the amount they paid, and that the premium given was for the exclusive benefit of the company; that the business of the company would be extended into other states, including Illinois, Nebraska, Missouri and Kansas; that a branch office would be established at Clarinda, where a large share of the business of the company would be done; that large deposits would be kept in a Clarinda bank, and other advantages would accrue to the persons whose subscriptions were solicited and finally obtained. Some of the representations were in regard

to matters to happen in the future, and were mere expressions of opinion; but others were in regard to facts alleged to exist, and were in material respects false, and operated as a fraud upon the Butlers. The company had so far authorized the negotiations, and has since so far ratified them, that it is bound by them and by the means taken to secure them.

It may be conceded that the transaction was so far fraudulent that, had the necessary action been taken in due time, it would have been set aside. The branch office promised was established, and maintained for about one year, when its business was transferred to Cedar Rapids. An attempt was made to do business in other states, but it failed. John P. Burrows was one of the Clarinda subscribers, and in August, 1882, he was elected a director of the plaintiff. He did not own enough of its stock to hold that office, and he borrowed of the Butlers the shares which they owned to enable him to accept the office. Burrows held the stock so transferred until January, 1884. During the time he so held it he acquired such knowledge of the affairs of the company that he reached the conclusion that it was not in good condition, [and he sold his stock. He was elected director by means of the Butler influence to represent the Clarinda stockholders, and was relied upon to keep them advised as to the business and condition of the company; but it does not appear that he disclosed the information he had obtained until after he had sold his stock in the year 1884. The Butlers then commenced investigating the affairs of the company, William Butler acting for them. They learned as early as the fall of the year 1884 that the condition of the company had been misrepresented to them by Albright, although they did not, perhaps, ascertain all the facts until this cause was tried in the district court. But we are of the opinion that their knowledge in regard to the management and condition

of the company and the fraudulent character of the representations made to them at the time last stated was of such a character that they should be charged with knowledge of the fraud of which they now complain from that time. C. J. Deacon has been a stockholder and member of the board of directors of the plaintiff since the year 1881. He is also its attorney. William Butler corresponded with him after being told of the condition of the company by Burrows, and early in the year 1885 had an interview with him. From that time until the commencement of this action he appears to have been threatening suit against the company to obtain some relief, but he did nothing of a decisive nature. The correspondence between William Butler and Deacon was especially active during the year 1885, and was continued at least until the year 1887. In that correspondence Butler expressed much dissatisfaction with the management of the company, and threatened to apply for the appointment of a receiver. On the part of the company Deacon sought to discourage action by Butler, and represented from time to time that the affairs of the company were improving; that there was a prospect that dividends would be paid to stockholders, and that they would eventually learn that the dissatisfaction that they felt was not warranted; and that proceedings in court would do no good, but would result in harm. The Butlers evidently remained quiet in consequence of these statements, which were for the most part mere expressions of the opinion of Deacon. They permitted the settlement of the business of the company and the discharge of its obligations to proceed, with the knowledge that they appeared to be stockholders of the company, and that the note and mortgage in suit seemed to be their valid obligations, for the period of nearly four years. The conclusion is fully warranted by the evidence that they were waiting until in the settlement

of the affairs of the company it should appear whether it was for their interest to repudiate liability on their part as stockholders and refuse payment of the note in suit, or to acknowledge such liability and accept the dividends which would be paid to them as stockholders. It is manifest that such a course cannot be upheld by a court of equity.

The capital stock of the plaintiff constitutes a fund for the payment of its obligations. If there be a surplus after they are discharged, it belongs to the stockholders. A subscriber for the stock of a corporation, who has been induced to become a member by fraud, owes it to all persons dealing with the corporation and trusting to its financial responsibility, to all persons who may thereafter become interested in the corporation, to all stockholders, and to the corporation itself, to act diligently to discover the fraud, and when it is discovered to act with promptness in terminating his obligation as a stockholder, if he elect to terminate it. 1 Morawetz on Private Corporations, secs. 108, 302, 308; *Upton v. Tribilcock*, 91 U. S. 45. In the conversation and correspondence with Deacon, William Butler expressed dissatisfaction with the manner in which he had been treated, and a desire to get rid of the stock in controversy, and to obtain the note and mortgage in suit. Attempts were made to find a purchaser for the stock, but they failed. In none of these negotiations does it appear that there was an unequivocal attempt on the part of Butler to rescind the contract of membership and stand upon his legal right to do so. Meanwhile there were transfers of stock and other acts by which innocent parties may have acquired rights which would be prejudiced by permitting the defendants to succeed in their defense. We conclude that the Butlers have wholly failed to use the diligence and act with the promptness required.

Other stockholders have been compelled to contribute more than sixty per cent. of the par value of their stock for the purpose of discharging corporate liabilities, and it is their right to insist that the Butlers contribute their just proportions.

It is objected that the defense of laches interposed to the claim of the appellants should have been pleaded in a reply, and that, as it was not, it ought not to be considered. We do not find that the objection was presented to the district court, and we do not think it should be sustained now.

2. PLEADING: practice in supreme court.

Judgment was rendered in favor of plaintiff for twenty-three hundred and ninety-eight dollars and thirty-five cents, besides attorney's fees and costs. The amount due on the note at the date of the judgment, which was January 4, 1890, was twenty-three hundred and eighty dollars and eight cents. But the plaintiff held three hundred and fifty dollars to the credit of the Butlers as an unpaid dividend on their stock, for which an accounting was asked by them. That should have been deducted, and judgment rendered for two thousand and thirty dollars and eight cents, and an attorney's fee and costs. The judgment of the district court will be modified to that extent, and in other respects approved. MODIFIED AND AFFIRMED.

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## J. H. TOOMAN, Appellant, v. DAVID HIDLEBAUGH, Appellee.

**Boundaries:** APPOINTMENT OF COMMISSION: JURISDICTION. Under the provisions of section 2 of chapter 8 of the Acts of the Fifteenth General Assembly, providing for the appointment of a commission of one or more surveyors to make a survey of and permanently establish corners and boundaries of land in this state, where the same are lost or are in dispute, the district court has jurisdiction upon the application of one

owning land within the county to appoint such commission where the adjacent tract of land to be affected lies in another county, and the line which it is sought to have changed is the boundary line between the two counties.

*Appeal from Greene District Court.* — HON. J. H. MACOMBER, Judge.

MONDAY, JUNE 1, 1891.

THIS is a proceeding to establish a boundary line, and to restore a lost corner of land owned by the plaintiff. A demurrer to the petition was sustained, and the plaintiff appeals.—*Reversed.*

*Howard & Rose*, for appellant.

*E. W. Weeks*, for appellees.

ROBINSON, J.—The pleadings show the following facts: The plaintiff is the owner of the east half of the southwest quarter of section 32, in township 82 north, of range 31 west, in Greene county. The defendant Davison owns the west half of the southeast quarter of the same section. The defendant Moles owns the west half of the southwest quarter of that section, and the southeast quarter of section 31, adjoining on the west. The defendant Hidlebaugh owns the west half of the northeast fractional quarter, and the northwest fractional quarter of section 5, in township 81 north, of range 31 west, in Guthrie county; and the defendant Moore owns the northeast fractional quarter of section 6, in the same township and range. The southeast and southwest corners of the southwest quarter of section 32 are lost and in dispute, and the plaintiff is unable to establish the south boundary line of his land until the corners are restored. The parties to the proceeding are unable to enter into a written agreement to employ and abide by the survey of a surveyor, and said corners

and the line between them are in dispute between the parties to this proceeding. The plaintiff asks the appointment of a commission of one or more surveyors to make a survey of and permanently establish the corners in dispute, and the boundary line between them. The defendants, Davison and Moles, filed separate answers, in which they admitted the allegations of the petition, and asked that its prayer be granted. The defendants, Hidlebaugh and Moore, demurred to the petition on the grounds that a part of the lands, the boundary lines of which the plaintiff seeks to have restored, is in Greene county and a part in Guthrie county; that the line to be affected or changed was the boundary line between said counties, and that by reason of the location of the land in different counties the court had no jurisdiction of the matter in controversy. From the order of the court sustaining the demurrer the plaintiff appeals.

This proceeding was instituted under the provisions of chapter 8 of the Acts of the Fifteenth General Assembly. Section 2 of that act authorizes such proceedings "whenever one or more proprietors of land in this state, the corners and boundaries of whose lands are lost, destroyed, or are in dispute, or who are desirous of having said corners and boundaries permanently established, and who will not enter into agreement to employ and abide by the survey of some surveyor. The proceeding is commenced by causing to be served "on the owner or owners of adjacent tract or tracts, if known and residing in the county where said lands are situated, or, if not known and not residing in such county, by publishing in a newspaper published in such county, and, if no newspaper shall be published, then by putting up in four different public places in said county a written or printed notice to the effect that on a day named therein he, she or they will make application to the district court of the county in which said

lands are situated, at its next succeeding term, for the appointment of a commission of one or more surveyors to make survey of and permanently establish said corners and boundaries." The act is general in its terms, and applies to all "proprietors of land in this state, the corners or boundaries of whose lands are lost, destroyed or in dispute, or who are desirous of having said corners and boundaries permanently established," and who will not enter into the agreement in writing provided for by the act. There is no ground for concluding that it was the intent of the general assembly to exclude from its provisions boundaries and corners which should be in boundaries of counties. The land which determines the jurisdiction of the court whose aid is invoked is that of the proprietor who gives the notice and files the petition which the law requires to authorize the court to act. The "adjacent tract or tracts" may or may not be in the same county as that of the petitioning proprietor. The end to be accomplished is to establish permanently the corners and boundaries of the land of the proprietor who makes application for that purpose, and the district court of the county in which that land is situated has jurisdiction to grant the relief demanded. The establishing of the corners and boundaries of adjacent tracts of land is an incident of that relief.

The interpretation we have given to the statute under consideration is in harmony with the general policy of the law. Section 2576 of the Code provides that actions for the recovery of real property, or of an estate therein, or for the determination of such right or interest, must be brought in the county in which the subject of the action, or some part thereof, is situated. It follows that such actions may be brought in counties in which but a part of the real property which is the subject of the action is situated. The order of the district court sustaining the demurrer is REVERSED.

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# H. M. MORGAN, Appellant, v. CHARLES KOESTNER, Appellee.

1. **Intoxicating Liquors**: NUISANCE: LESSOR'S LIABILITY. Where property was leased for a lawful purpose, and the lessee used the same for the illegal sale of intoxicating liquors without the knowledge of the lessor, who, after the issuance of a temporary injunction against him because of said nuisance, notified the lessee to quit the premises, and afterwards, in good faith, prosecuted an action of forcible entry and detainer for the possession of the property, but was denied the relief sought, *held*, that upon the final hearing of the injunction proceedings the temporary injunction against the lessor was properly dissolved, and the action dismissed as to him, but that the nuisance should, nevertheless, have been abated by order of the court.

2. ———: ———: ———: COSTS. The owner of real estate is not liable for the costs of an action for the abatement of a saloon nuisance maintained upon his premises without his knowledge or consent.

*Appeal from Des Moines District Court.*—HON. CHARLES H. PHELPS, Judge.

MONDAY, JUNE 1, 1891.

ACTION to abate a saloon nuisance. John Linder and Henry Hirt were made codefendants with Koestner. Koestner was and is the owner of the land on which the saloon was maintained. He leased it to Louis Bannier for five years, with authority to erect a building thereon for "confectionery purposes." Upon a preliminary hearing in this suit, a temporary injunction was granted against Koestner, and thereafter he notified Bannier to quit the premises, and remove his building, and, upon his neglect or refusal, Koestner instituted a proceeding for the forcible entry and detention of real property against Bannier, who resisted, and a judgment was entered in his favor before the justice, and also on appeal to the district court, as we understand, on the ground that Bannier was not a party to the suit, and in

no manner bound by its proceeding. These facts were pleaded by Koestner on the final hearing in this suit, and by the proofs it was found that John Linder was maintaining the nuisance; that Koestner is the owner in reversion of the real estate. The temporary injunction was dissolved as to Koestner, and the action dismissed as to him and Henry Hirt. A decree was entered against John Linder. From the judgment as to Koestner the plaintiff appeals.—*Affirmed.*

*Newman & Blake*, for appellant.

*P. Henry Smyth*, for appellee.

GRANGER, J.—I. It is for us to determine the legal effect of the facts pleaded and proved by the defendant Koestner. These facts are, as we understand, that he leased the lot to Bannier for five years, with the right to Bannier to construct a building thereon for confectionery purposes; that the building was erected, and the defendant Linder conducted a saloon therein; that Koestner did not know the purpose to which the building was put; that, after the granting of the temporary injunction, Koestner notified Bannier to quit the premises and remove the building, which was not done; that Koestner then prosecuted his suit for the forcible entry and detention of real property, under the law in such cases, to terminate his lease; and that in the trial of such suit, both original and on appeal, he was defeated. The facts thus far are without dispute. It is, however, questioned in argument that Koestner, in leasing the lot and in his efforts to prevent its use as a saloon, acted in good faith. We see nothing in the record to justify us in finding that, when the lot was leased to Bannier, Koestner intended or knew that it would be used for saloon purposes, or that he knew it was being so used before this suit was commenced.

1. INTOXICATING liquors: nuisance: lessor's liability.

After obtaining the knowledge, he seemed powerless to prevent such use. He resorted to the courts for a judgment that would terminate his lease, and give him control of the lot, but the judgment was refused and the query forces itself upon our minds, if he could not prevent such use, will the law, by injunction, command him to, and punish him if he does not? We need not express the answer.

The original notice in this case was served July 8, 1889, and gave notice that the petition would be filed on or before the twenty-ninth of August, 1889. The answer was filed September 16, 1889, and on the twentieth of November, after, notice was given of an application for a temporary writ of injunction, which was issued on the fifth of December, 1889. It was after the issuance of the writ that Koestner commenced his suit to revoke the lease and obtain possession of his property, and this fact is urged as showing bad faith and unnecessary delay. But the facts upon which the adjudication was against Koestner were the same during all the time, and we must assume that with like facts a like judgment would have been entered. It thus appears that during all the time after he had knowledge of the use of the lot he was without the means to prevent it. The effect of the delay complained of was not to continue or encourage the nuisance. Under such a state of facts, it is clear to us that Koestner should not be made liable for the penalties of an injunction against the continuance of the nuisance by another.

The lot and building were by the district court found to be a place where intoxicating liquors were kept and sold contrary to law, and hence it was a nuisance, and should, by the judgment of the court, have been abated, notwithstanding who may have been the owners. Code, sec. 1543. The court found that John Linder was the person occupying the premises and maintaining the nuisance. It enjoined him from further maintain-

ing the nuisance, but did not decree its abatement, as the law provides. Acts, 20th Gen. Assem., ch. 143, sec. 5; *McClure v. Braniff*, 75 Iowa, 38. The law makes provision for the owner, in such case, to release his property from the effect of such a decree. A decree abating the nuisance will be entered in this court.

II. The remaining question is as to the liability of Koestner for the costs; that is, should the costs have been decreed a lien upon the lot? The owner who does not maintain the nuisance is thus made liable when the premises are so used, with his knowledge or that of his agent. Code, sec. 1558. It does not appear in this case that Koestner had such knowledge. The facts upon which the appellant relies, as those from which we should presume or find the fact of knowledge, are insufficient. It is a fact that the opposition to the enforcement of the law against the sale of intoxicating liquor has led to many ingenious methods of evasion, and the courts should be alert and cunning to see the truth within the lines of correct information, and, when seen, unhesitatingly apply it. On the other hand, they should so guard their judgments that they be the result of facts found from evidence, rather than unwarranted presumptions. It is presumed that the owner and lessee of the building was, at the commencement of the suit, unknown to the prosecution, as he was not the occupant. Had he been made a party, much of the difficulty in the way of the judgment sought would have been avoided.

2. —: —: —: costs.

With the modification indicated in the opinion, to be entered in this court, the judgment will be AFFIRMED.

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# MT. ZION BAPTIST CHURCH AND J. D. ISRAEL *et al.*, Appellants, v. H. A. WHITMORE *et al.*, Appellees.

1. **Religious Societies**: SUBVERSIVE TEACHINGS: CHURCH PROPERTY: RIGHTS OF MINORITY. The Mt. Zion Baptist Church of Bonaparte, having purchased lots and erected buildings thereon in the year 1852, adopted certain articles of faith as published in the minutes of the Des Moines Baptist Association in 1848. In 1885 the pastor of the church and certain of the members became adherents to the doctrine of "sanctification by a second experience," and, because of differences of opinion arising between the members in respect thereto, charges were preferred against certain of the members who opposed the teaching of said doctrine, and they were excluded from the fellowship of the church. The persons thus excluded, with those sympathizing with them, having assembled and decided that they constituted "the true and original Baptist Church of Bonaparte," called to its service a pastor, and demanded the possession of the church property, which was refused. By the agreement of the two factions the differences between them in respect to said doctrine of sanctification was submitted to a council of Baptist ministers, which decided that said doctrine was not in harmony with the teachings of the Baptist denomination, but was subversive of the very end sought by it, and was destructive of the peace of their churches. *Held*, that the adherents of said doctrine of sanctification, though constituting a majority of the whole number of members of said church, could not divert the use of its property to the promulgation of doctrines different from the faith for the advancement of which the church was organized, and that a court of equity would interfere to protect the minority in having the trust property applied in accord with the original intent.

2. ———: ———: ———: ———. The whole membership of the church having agreed to submit the creed of the church in respect to said doctrine to a council as aforesaid for settlement, *held*, that the decision of the council that said doctrine was not in accord with the Baptist faith was binding upon the majority.

3. ———: ———: ———: ———. The council aforesaid found that the doctrine of sanctification as taught by S. and others was not in harmony with the teachings of the Baptist denomination, and recommended that the doctrine nevermore be taught in said church. Thereupon at a meeting of the church representing the entire membership the said action of the council was accepted. Subsequently, however, the church annulled its former action, and rejected the action of the

council as to the finding and recommendation aforesaid, but accepted it in other respects. *Held*, that the evidence warranted the finding that the defendants believed in said doctrine as taught by S., and that it was their purpose to teach it in the church.

*Appeal from Van Buren District Court.*—HON. DELL STUART, Judge.

MONDAY, JUNE 1, 1891.

THIS is an action to enjoin the defendants from an unlawful use of church buildings and records. There was a decree for the defendants, and the plaintiffs appeal.—*Reversed.*

*Craig, McCrary & Craig* and *Sloan, Work & Brown*, for appellants.

*Wherry & Walker*, for appellees.

GRANGER, J.—The Mt. Zion Baptist Church was organized in October, 1842, and incorporated in December, 1851, and is located at Bonaparte, in Van Buren county. In 1852 it became the owner of lots 10 and 11, in block 12, in Bonaparte, and has erected buildings thereon for the use of the society, including a church and parsonage. The articles of association provide that "the articles of faith and church covenants published in the minutes of the Des Moines Baptist Association in the year 1848 shall be the articles of association adopted by this church, together with such rules of order as we may, from time to time, adopt, and the same is hereby adopted." In 1885, because of the teachings of one Aura Smith and his brother, of an experience or condition of "sanctification by a second experience," or "sinless perfection," there were differences of opinion and trouble among the

1. RELIGIOUS SOCIETIES: subversive teachings: church property: rights of minority.

members of the church. The pastor of the church, Rev. C. L. Custar, one H. A. Whitmore and others, were regarded as adherents of the doctrine thus taught, and placed under charges of heterodoxy, with a request that a council of ministers and deacons be convened to hear and adjust the complaints. The persons thus charged were, at a regular meeting of the church, without trial or investigation, exonerated from the charge by a motion for that purpose. This action was had on the seventh of January, 1888. On the fourth of February thereafter charges were preferred against J. D. Israel, L. H. Mills, J. H. Murphy, Mrs. Troutman and Mrs. Cox, who were of those opposing the alleged new doctrines. The charges were as follows:

"*First.* For disregard of authority; refusing to submit to the requirements of the church; setting aside the authority and majority of the church in its actions and rulings. *Second.* For contention and strife; causing division; being leaders of evil; destroying the peace of the church; attempting to divide the church. *Third.* For false witness; testifying to things known to the church to be entirely false, against Bro. C. L. Custar and other members of the church in good standing."

There was no trial upon the charges, but the church proceedings show as follows: "The charges are of such a nature as to require immediate action, and motion to exclude the parties named from the fellowship of the church carried." The record from this forward recognizes two "factions" in the church,—one designated as the "Whitmore Faction," and the other as the "Israel Faction;" and they are so generally spoken of in the record and arguments, the Whitmore faction being largely in the majority. On the sixth of June, 1888, the Israel faction, about fifteen in number, assembled at the house of Mr. Israel, and, because of the difficulties existing in the church, caused by the

false doctrines being taught in the church by the "former pastor, Rev. Custar, and other members of the church * * * namely, sanctification, a second blessing, especially to be sought for, and sinless perfection, and by using unscriptural discipline," decided that they constituted "the true and original Baptist Church of Bonaparte;" and it is this organization, with certain of its members, that are parties plaintiff for and on behalf of those having a common interest; the defendants being H. A. Whitmore and others, for and on behalf of those "associating and acting with them." The Israel faction, after deciding that it was the church, called to its service as pastor Rev. J. L. Cole, and sought the possession and use of the church building and property then in the possession of the Whitmore faction, which was refused. On the first of August, 1888, a council of seven Baptist ministers assembled at Bonaparte, at the joint call of the two factions, and the following is the record of the matters to be submitted to it:

"The statement of reasons for calling the council was read by the minority, of which the following is a synopsis:

"'*First.* That two brothers, William and Aura Smith, being professedly ministers of the gospel, came into our midst early in 1885, preaching the doctrine of entire sanctification and sinless perfection, inviting all professing Christians to seek this experience, and ridiculing Christians who failed to accept this invitation, and finally urging those who did accept this invitation to attend holiness prayer-meetings. That Bro. C. L. Custar, a former pastor of this church, and several members of this church followed after these Smith brothers, and accepted the aforesaid doctrine. *Second.* That Brother Custar taught this doctrine from the pulpit of this church. That a holiness prayer-meeting was organized in the spring of 1885, and carried on till

May, 1888. That members of this church professed entire sanctification, neglecting the regular meetings of this church for holiness meetings. That this doctrine became a means of disturbance and alienation of feeling among the members. *Third.* That the teaching and acceptance of this false doctrine has been a cause of the difference of opinion and of the action of a minority in organizing the new body, and claiming to be the real Bonaparte Baptist Church.

"'[Signed] J. D. ISRAEL,
"'And others.'

"Reasons for calling a council were read on behalf of the majority party, of which the following is a copy:

"'The Bonaparte Baptist Church organized the council to examine its faith and practice; its faith with reference to the doctrine of sanctification; its practice or discipline with regard to the exclusion of certain members of the church, who have since formed another organization, and claim to be the original and true Bonaparte Baptist Church. We want to know if we have so far departed from the church once delivered to the saints that we can no longer be recognized as a regular Missionary Baptist church. We desire to know wherein we have wronged those whom we have excluded, that we may confess the same, and do all in our power to repair the broken house of our beloved Zion.

"'[Signed] H. A. WHITMORE,
"'C. L. CUSTAR,
"'Committee.'"

J. D. Israel and H. A. Whitmore, as "leaders," and on behalf of their respective factions, signed the following:

"For the sake of peace and harmony, and for the glory of our common Lord, it is hereby agreed that the findings and recommendations of this council shall be accepted as final, and in the fear of and by the help of

God, we will carry them out in spirit, as well as in letter.

"[Signed] J. D. ISRAEL,
"H. A. WHITMORE."

Each party selected a person to conduct the examinations in its behalf, and the record states that the examination was "thorough, satisfactory and conducted in good spirit." Revs. Cole and Custar were appointed to receive the decision of the council, "on behalf of their parties, respectively," and afterwards the council unanimously returned the following findings:

"*First.* We find that the doctrine of entire sanctification, taught by the Smith brothers, Miss Rornack, and confessedly, also, by Bro. C. L. Custar, in the church, is not in harmony with the teachings of the Baptist denomination, which deny instantaneous sanctification, the so-called second blessing, and sinless perfection. We hold to a true spirituality in our churches; to a high standard of Christian living; to progressive attainment and growth in grace. On the other hand, we hold that the doctrine of entire sanctification is subversive of the very end sought; destructive of the peace of our churches, in some instances destroying the churches themselves; and should be avoided as a deadly error. We are rejoiced at the noble stand taken by Bro. C. L. Custar in confessing his error in respect to this doctrine, and we trust that juster views of scripture teaching, on this point, may prevail in this church and community.

"*Second.* The council recommend that the teaching of the above erroneous doctrine of second experience, or entire sanctification, be taught in this church no more, forever; and that the teaching of it in this church, or permitting it to be taught in the church, is a just cause for church discipline.

"*Third.* We find that the exclusion of the three

members of the choir was justifiable and regular, and we recommend to the young ladies that they make suitable acknowledgment to the church.

"*Fourth.* We find that the exclusion of J. D. Israel, L. H. Mills, James Murphy, Mrs. C. O. Troutman and Mrs. J. W. Cox was hasty and unjustifiable. We recommend that the action of the church in excluding them be at once rescinded."

At a regular meeting of the church, August 19, 1888 (both factions, as we understand), the decision of the council was, on motion, accepted; and the action of the church in expelling J. D. Israel and others, on the fourth of February, was rescinded. At a meeting of the church, on the tenth of September, 1888, the church annulled its action of August 19; and again, on the third of November, it took action on the findings of the council separately, and rejected numbers 1 and 2, being those with reference to the doctrine of sanctification. The petition recites the substance of the foregoing, and contains averments that the defendants, and those associated with them, have departed from the faith and practice of the Baptist church, and are using the church building and records for the benefit and promotion of doctrines and a faith contrary to and in violation of the faith, covenants and practice of the Baptist denomination, to maintain which the said church was organized and the buildings erected. The relief sought is, that the defendants be restrained from interfering with the plaintiff in the free use of the church buildings and property for their legitimate use as a place of worship, and teaching the doctrines of the denomination. The answer puts in issue the allegations of the petition, that the defendants have departed from the faith and practice of the Baptist church, and are using the church property, or records, for a purpose in violation of the teachings and doctrines of the denomination, and deny that the plaintiffs

are denied the free use thereof for any legitimate purpose.

The council found the doctrine of "entire sanctification," as taught by Smith brothers, was "not in harmony with the teachings of the Baptist denomination," but "subversive to the very end sought," and "destructive of the peace" of the churches. The correctness of this doctrine as a rule of faith and observance in the Baptist church was in dispute between the factions. It was not, as indicated by appellees' argument, a question of the truth or falsity of the doctrine on scriptural authority, but it was in accord with, or subversive of, the covenants and practice of the Baptist church, with the limitations imposed by its articles of association? This was a purely theological question, and a council of theologians from that church was a proper tribunal to determine such a question, and was so recognized and agreed upon by the parties. It is, however, contended by the appellees that they are not bound by this finding of the council, and we notice their reasons, or at least some of them. Much stress is laid upon the fact that each Baptist society is an independent body, with no higher ecclesiastical authority for its control; that its form of government is congregational where a majority govern; and that it is within itself "a little republic." It should be borne in mind that it is the distinctive character of the *Baptist church government* that is relied upon to make it an exception, and free it from the generally expressed rule of law, by which a minority of an association may claim its property against a majority seeking to divert it from its legitimate use. A quotation from appellees' argument will indicate clearly the objection to be met. It is said: "Yes, we repeat again if this church or any other Baptist church desires to change its 'articles of faith' or belief, it may do so, if a majority of its members

concur therein. If it desires to change to a Mormon church it may do so, and no person or persons, no man or body of men, either civil or ecclesiastical, has any right to interfere. It owes no allegiance to any man or body of men, except a majority of its own members. It has no creed except the Bible, and the right of its own members to interpret that according to the dictates of their own consciences. If a majority of the members of that church believe the Bible to teach a certain doctrine, then that is 'Baptist doctrine,' because that church has the right and the power to determine for itself what the Bible teaches, and no other church or churches has any right to interfere therein. The Baptist as a denomination, have no creed. There is no such thing as a one Baptist church with a one Baptist creed or belief. All there is of 'Baptist creed' consists in the right of each separate church to interpret the Scriptures for itself, and to say for itself what it believes the Scriptures to teach. There are as many 'Baptist churches' as there are several societies or congregations. There are as many 'Baptist denominations or creeds' as there are several societies or congregations which have given expression to their belief of what the Scriptures teach." Afterwards follows the conclusion: "We conclude, then, if there be a difference of opinion between the plaintiffs and defendants as to what the Bible teaches with reference to sanctification, and the defendants are in a majority and plaintiffs a minority, according to Baptist practice and usage there is but one remedy, namely, 'they may retire, and find a home in some other church; or they may organize themselves into a new one.'" This exclusiveness of government within the strict lines of ecclesiastical authority may be conceded; but we are constrained to doubt that any writer, either upon ecclesiastical or civil law, where a controversy involved the right of a minority of an association to have its property devoted to the purpose

for which it was given or granted, has laid down a rule so broad. As we think these statements and the conclusion lay at the foundation of other errors into which the appellees have fallen, a brief consideration of them, and some rules of law, will render a consideration of many questions unnecessary.

Let it be understood at the outset that we are not adjudicating the right of any person to a religious belief or practice, nor are we to determine the truth or falsity of the doctrine of "sanctification," or "sinless perfection." Upon authority so general as to be beyond question it is held, that property given or set apart to a church or religious association, for its use in the enjoyment and promulgation of its adopted faith and teachings, is by said church or association held in trust for that purpose, and any member of the church or association, less than the whole, may not divert it therefrom. The following cases more or less directly sustain the rule, and are but a few of the many bearing on the question: *Kniskern v. Lutheran Church*, 1 Sandf. Ch. 439; *Attorney General v. Pearson*, 3 Mer. 353; *Baker v. Fales*, 16 Mass. 487; *Stebbins v. Jennings*, 10 Pick. 172; *Hale v. Everett*, 53 N. H. 9; *Lawyer v. Cipperly*, 7 Paige, 281; *Baptist Church v. Witherell*, 3 Paige, 296; *Harrison v. Hoyle*, 24 Ohio St. 254; *Field v. Field*, 9 Wend. 401; *Gable v. Miller*, 10 Paige, 627; 2 Denio, 492; *M. E. Church v. Wood*, 5 Ohio, 284; *Happy v. Morton*, 33 Ill. 398; *Lawson v. Kolbenson*, 61 Ill. 407; *Dublin Case*, 38 N. H. 459; *Watson v. Jones*, 13 Wall. 679; *Fadness v. Braunborg*, 73 Wis. 257; 41 N. W. Rep. 84; *Presbyterian Church v. Congregational Soc.*, 23 Iowa, 567. The Mt. Zion Baptist Church came into possession and ownership of the property it now holds under a profession of faith and practice limited by the "articles of faith and church covenants published in the minutes of the Des Moines Baptist Association in the year 1848," which we understand to accord

with the teachings of the Baptist denomination. These articles of faith and church covenants, and the teachings with which they accord, are a limitation on the trust or use to which the property may be applied. Nice distinctions or shades of opinion on doctrinal points or practice do not merit the interference of a court of equity, and it is only when the departure from the faith is so substantial as to amount to a diversion of the property from the trust purpose that courts will interfere. The council selected by the parties declared, in effect, the doctrines taught by Smith brothers to be a deadly error, and destructive of the peace of the church. Treating this finding for the present as legitimate and true for the purposes of the case, and the situation is that property given and devoted to the promotion of the Baptist church is being used for its destruction. The appellees' contention because of their claims for the distinctive or independent character of the Baptist church, by which a majority may, without limitation, govern, would permit this result. They take the Scriptures as the only limitation upon or authority over the power of the church, both as to spiritual and material affairs, within the church; and wherein the members may differ the majority control, without reference to the original purposes of their association. The error of appellees in their claim for the "independency" of the majority in a Baptist church lies in a mistaken conception of what should be understood by "government." The power of the majority to govern is derivative, and the source of derivation limits the power. The organization gave birth to the church, and a power to govern the church. The church is Baptist because of the faith and covenants that make it so. It is not the faith and covenants that need or are to be governed, but the members in the enjoyment and fulfillment of the same. The power to govern the church gives no power to change the

church or the faith and covenants that fix its character. The property of this church is the common property of all its members, and each has such an interest therein that he may insist that it shall be devoted to the religious faith for which it was given. The manner of the application is delegated to the judgment of a majority of the members of the church, but there is no delegation of authority to the majority to apply it to the advancement of a church of another faith by a direct transfer, or by changing the faith of a majority of the members of the church. It is when such an attempt is made that a court of equity will interfere to protect the rights of a minority in having the trust property applied in accord with the original intent. In *Schnorr's Appeal*, 67 Pa. St. 138, it is said: "When the founders or donors have clearly expressed their intention that a particular set of doctrines shall be taught, or a particular form of worship and government maintained, it is not in the power of individuals having the management of the institution at any time to alter the purpose for which it was founded." In the same case it is further said: "In church organizations those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation." *Roshi's Appeal*, 69 Pa. St. 462; *Rottman v. Bartling*, 35 N. W. Rep. (Neb.) 126. If, perchance, a bare majority of some Baptist church should determine, on scriptural authority, their right to a plurality of wives, and, against the protests of a minority, devote the property of the church to the advocacy and practice of such a doctrine, under the claim of appellees that the church "owes no allegiance to any man or body of men," civil or ecclesiastical, except a majority of its members," the only redress of the minority would be to retire from the church, and leave the property to the majority for such a purpose. Such a surrender of civil rights is without support on

any principle of natural justice, and we believe without the sanction of any judicial tribunal. We, of course, treat and understand the arguments and claims of parties as to the law to be applicable to the property interest of a church, for it is the only question involved in this suit.

It is said in *Schnorr's Appeal, supra*, in a very similar connection, that "the guaranty of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches." The thought, with no intent or reason to impute a criminal or dishonest purpose in this case, is not without application to the marvelous freedom from interference claimed for a majority in a Baptist church, because of a congregational or independent form of government. It is further said in the same connection that such freedom "secures to individuals the right of withdrawing, forming a new society with such creed and government as they please, raising from their own means another fund, and building another house of worship; but it does not confer on them the right of taking the property consecrated to other uses by those who may now be sleeping in their graves." Mt. Zion Baptist Church was organized in 1842, and prospered, without dissension, till 1885, when this new doctrine, which had not before been taught or recognized in the church, was introduced. With its introduction began trouble, resulting in a division of the church upon religious faith as justified by the Bible. Not alone the finding of the council, but the record on other grounds, leads to the conclusion that, at the organization of the church and long after, it was not thought of as a doctrine of faith or belief in the church. The newness and singularity of the doctrine in that church and community seemed to render it one for especial teaching and information, leading to the holding of "holiness meetings;" and the truth of such religious experience was in dispute among professing

christians, and especially in the Baptist church. Copious citations from the Scriptures and from religious treatises are made in support of a doctrine of sanctification which it is neither our province to deny or affirm. It is likely true that one purpose of these citations is to show that the sanctification, the teaching of which the council found to be a deadly error, was not that taught by the defendants, but that it was a doctrine of sanctification in accord with the teaching of the Baptist church, which fact will be hereafter noticed.

II. It is urged that the findings of the council are without force, and not binding upon the defendants or on this court, because the church knows no tribunal except the church itself, and hence the action of the council is void. But has not this independent body a right to act for itself,—to agree upon a lawful method of adjusting any differences it may have? Where is the power to gainsay its right to do so? We do not hold, for it is not our province, that for the purpose of church observance the findings of the council are obligatory. Such is purely a matter of ecclesiastical direction and authority; but the ecclesiastical question there determined, as to the fact of the doctrine taught by Smith brothers being error against the faith of the church, we think is conclusively settled, and that it may be shown in the civil courts, in matters of which they take jurisdiction, when material to the question at issue. A reference to the reasons for calling the council shows this doctrinal question to have been in dispue, and the majority recognized itself as a party to a controversy on a doctrinal question, the settlement of which was for the "sake of peace and harmony, and for the glory of our common Lord." It was by common consent a method of settling the creed of the church, and their acts in this respect, being of all the members, are as available in the civil courts to protect property rights as are their

acts at the organization of the church in fixing its creed and character. It will be observed that we are not holding that the recommendations of the council are of like effect, nor are we attaching legal signification to them. They do not go to the conditions that fix property rights with which we deal. After the majority has recognized itself a party to a controversy that should be settled in the interest of peace and harmony, the claim that it should itself sit in judgment to determine the controversy is somewhat novel. The minority lay at the door of the majority the charge of heresy. The majority says: "We constitute the church. All power is vested in the church, and hence in us. We determine that the charge is false." This is the precise claim made by the appellees as to the power of a majority, and it is the precise action taken by the appellees as a majority in Mt. Zion Baptist Church, after which the council was called, the action of which it would now repudiate. In view of this, the claim of the majority that "if it desires to change to a Mormon church it may do so, and no person or persons, no man or body of men, either civil or ecclesiastical, has any right or power to interfere," is not strange. The position leads to this: Consider the majority of a particular Baptist church as guilty of the grossest violations of and the widest departure from the church covenants and faith. Being accused by the minority, the accused sit in judgment, which it declares in its favor, and then pleads the judgment it declares as conclusive of its innocence, because no other man or body of men has authority to interfere. However such a rule may serve in purely ecclesiastical relations, we unhesitatingly say the civil law will not adhere to it where the result is to divert trust property from its proper channel.

III. But it is said the council did not find that defendants believed or taught the doctrine of sanctifi-

s. —: —: —: —. cation as taught by Smith brothers, and it is true that it is not in terms so found, although the inference is quite conclusive. If it was so found, the same reasons would not exist for our treating it as conclusive as in case of the doctrinal point before discussed. The inquiry as to the conduct of the defendants involves that before and after the proceedings of the council, and becomes a fact for us to find from the evidence. The evidence, independent of the finding of the council as to the extent the doctrine was believed and taught except as to a few, including the pastor, who at or before the sitting of the council confessed his error, would leave us in serious doubt on this question but for what transpired after the sitting. On the nineteenth of August the church (including the defendants) accepted the action of the council in pursuance of their agreement, and to this and the subsequent action of the church we attach much importance in determining the fact. The council had only found that the particular doctrine of sanctification taught by Smith brothers was error, and the acceptance of the finding reached to no other doctrine. The recommendation that it be taught no more in the church was only the "above erroneous doctrine." On the tenth of September the church by action annulled its action of August 19, and again November 3, by further action, it rejected the action of the council as to said finding and recommendations, and accepted it in other respects. Thus it is seen that the majority organized as a church has in effect declared its adherence to the erroneous doctrine, and refused to abide by the recommendation that it should not be further taught in the church. If the doctrine taught by Smith brothers was not that entertained by defendants, why reject the finding that it was error? If it was not the intention to teach it in the church, why reject the recommendation that it

should not be further taught? This conduct of the majority, in the light of other facts, is quite conclusive, to our minds, of both its belief in the doctrine and its purpose to teach it in the church.

But as a reason for the action of the church in repudiating the findings it is said: "The church had no right to sign the agreement, because it cannot delegate its authority, and the signing of the agreement was disloyalty to Christ, and a surrender of the cardinal principle of Baptist practice; namely, church independence." There is a seeming inconsistency between the language and conduct of the majority in this respect. The disloyalty to Christ appears to have been in making the agreement to abide by the action of the council, because of a surrender of principle. But the majority rejects part of the findings of the council and accepts other parts, one of which was favorable to it. We do not see how to sustain the appellee's claim, except upon the theory that the disloyalty in making the agreement depended on the character of the findings under it, which we do not think would be claimed.

It is again said: "For the defendants to have accepted these findings would have been for them to admit not that they were teaching or intending to teach any such doctrine, but that C. L. Custar, their former pastor, to whom they had given a letter of recommendation to a sister church, had been teaching the doctrine of sinless perfection." But Rev. Custar was present at the meeting of August 19, when the church accepted the action of the council, and took his letter of dismission at that time, and took part in the proceeding, favoring the acceptance; and the findings, which he was a committee of the majority to receive, show that he had been confessedly a teacher of the same doctrines as Smith brothers, and confessed his error. How can we, in the light of such a record,

accept the claim of the majority that in rejecting the finding and recommendation they were acting in the interest of the pastor? Other claims are made, as that the parties were by the council required to sign the agreement, which was wrong, but nothing in the record shows but that it was not entirely voluntary as to all parties.

It is further said that the action of a council is only advisory, and that it is never binding. The rule, as claimed, has the support of ecclesiastical authorities, but the agreement in this case made it more as to its effect on the property interests of the church. It is a question entirely different from that pertaining to conscience, or the general rules for church government, as to which the authorities cited have especial reference. It should be kept in mind, to avoid misapprehension, that we have only treated the findings of the council as conclusive, in so far as, by an agreement of the entire body of the church, it determined a dispute as to its former faith or creed.

We reach the conclusion upon the facts in the case that the majority have made a substantial departure from the original faith and covenants of the church, and have diverted the property from the purpose for which it was given or granted. In *App v. Lutheran Congregation*, 6 Pa. St. 201, it is said: "It is the duty of the court to decide in favor of those, whether a minority or majority of the congregation, who are adhering to the doctrine professed by the congregation, and the form of worship in practice, as also in favor of the government of the church in operation, with which it was connected at the time the trust was declared." *McGinnis v. Watson*, 41 Pa. St. 9; *Sutter v. Trustees*, 42 Pa. St. 503. In deciding who is entitled to control the church property where there is such a division, we must look to the situation when the dispute began. In *Roshi's Appeal*, citing the above author-

ities, it is said: "The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law; and the ecclesiastical laws, usages and principles which were accepted among them before the dispute began are the standard for determining which party is right." Thus aided by authority upon the facts as we find them, we are not in doubt as to our duty. The minority, when pressed from the church by the departure of the majority, having the church organization were justified in taking measures by organization to preserve the identity of the church and its property interests, and under the law were entitled to its use and control. It is only by placing it there that the trust will be observed, and the cause is remanded to the district court for a decree to that effect. REVERSED.

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## D. & E. CHAPIN, Appellants, v. BROWN BROS. *et al.*, Appellees.

1. **Contracts**: RESTRAINT OF TRADE: CONSIDERATION: VALIDITY. The grocerymen of a town entered into an agreement with the plaintiffs not to buy any butter nor to take any in trade, except for the use of their families; providing that such agreement should not prevent any merchant from buying butter to retail from any regular butter buyer who bought all the butter he handled in the town for cash. The contract recited as occasion for its execution that the grocerymen found the business of purchasing butter of the farmers, and handling the same, very burdensome, and they believed the same could be better handled as an exclusive business. The plaintiffs in said agreement undertook to open rooms conveniently located for buying butter, to keep a man in attendance thereat, to accept all butter offered, and to pay as high a price therefor in cash, as the merchants or butter buyers in the town of N., in the same county, were at the time paying. The contract was to continue for two years unless sooner dissolved, and it might be terminated at any time whenever the majority of the grocerymen were dissatisfied with the agreement or with the manner in which it was carried out. This action having been brought to enjoin one of the grocerymen from engaging in the business of buying and selling butter in said town, *held*, that said contract was without consideration, and was, therefore, invalid.

2. ———: ———. Such contract is also invalid as being in restraint of trade, and, therefore, against public policy.

*Appeal from Buena Vista District Court.*—HON. LOT THOMAS, Judge.

MONDAY, JUNE 1, 1891.

ACTION at law to recover one hundred and fifty dollars damages, and for an injunction to restrain the defendants from pursuing the business of buying butter at Storm Lake, in Buena Vista county. Application for a temporary injunction was made to the judge in vacation. The defendants appeared and filed objections to the granting of the writ. The objections were sustained, and the plaintiffs appeal.—*Affirmed.*

*T. H. Chapman* and *C. A. Irwin*, for appellants.

*T. D. Higgs*, for appellees.

ROTHROCK, J.—It appears from the petition that in the month of March, 1890, the plaintiffs entered into a written agreement with the defendants and other parties. The following is a copy of said agreement:

"We, the undersigned grocerymen of Storm Lake, finding the business of purchasing butter of farmers and handling the same very burdensome, and of material loss to us, and believing the same could be handled as advantageously by persons who would make butter buying and handling an exclusive business, and whereas the firm of D. & E. Chapin, through their agent, assure us of their ability to handle butter to the best advantage, and that they will engage in the business extensively in our town, we make a solemn engagement and pledge ourselves to each other and to the said firm of D. & E. Chapin that we will buy no more butter or take no more in trade, except for our family use, and all butter so bought shall be delivered by the seller to the buyer's place of residence. This, however,

shall not prevent any merchant from buying butter to retail from any regular butter buyer who buys all the butter he handles in this town for cash. It is further provided that the said firm of D. & E. Chapin, in whose favor we abandon the business, shall open rooms conveniently located for buying butter; that they shall keep a man in attendance during all business days and hours in the year from as early in the morning and until as late in the evening as the season of the year and state of the weather might seem to require. They shall accept all the butter offered, and shall pay for the same as high price in cash, or by giving check against a suitable deposit in some bank in this town, as merchants or butter buyers in the town of Newell, this county, are at the time paying in cash for a similar grade of butter, except in extreme cases, where they may be paying materially more than the markets will warrant. It is also provided that the said D. & E. Chapin shall not direct their checks or persons taking the same to any particular store for payment. That they shall not buy in connection with any dry-goods or grocery store. Whenever a majority of the merchants signing this article of agreement are convinced that the engagements herein entered into are not being complied with, or whenever they are dissatisfied with this arrangement or the manner in which it is being carried out, any merchant whose name is hereto appended may appoint a meeting by notifying each grocery firm in town of the time and place for the purpose of considering who may be guilty of a breach of faith in carrying out these engagements, or whether it is advisable to continue the same; and if, at such meeting, a majority of the subscribers hereto shall certify in writing that they think it advisable for the interest of the town to withdraw from this engagement, this contract shall become null and void. This engagement shall take effect and be in force from and after such time as when

it shall have been subscribed to by each grocery house in this town, and when the firm of D. & E. Chapin shall designate, provided they are then prepared to handle the butter, and shall continue two (2) years unless sooner dissolved, as herein provided. We also agree not to pay a higher price for eggs than shall be fixed by the said firm of D. & E. Chapin, provided said firm shall fix as high price as eggs are at the time worth to ship.

W. C. KINNE & Co.,
"FRED SCHOLLER,
"BROWN BROS.,
"J. O. DOUGLAS,
"W. A. JONES,
"GEO. E. FORD & BRO.,
"W. LOWNSBERRY,
"LIBBY & RAE,
"D. & E. CHAPIN."

It is averred in the petition that the plaintiffs, in pursuance of said written contract, came and located at Storm Lake and engaged in the business of buying butter at that place, and were at the commencement of the suit still so engaged, and have made arrangements to continue the business for the said period of two years, and that they have thus far fully complied with said written agreement, but that the defendants, in violation thereof, have opened a butter store in said town, and have engaged in the business of buying butter generally, and have thereby interfered with the plaintiffs' business, and alienated their trade to the extent of five thousand pounds of butter, upon which the plaintiffs would have realized a profit of three cents a pound, making in all one hundred and fifty dollars damages suffered by the plaintiffs. Judgment is demanded for said sum, and an injunction is prayed, restraining the defendants from continuing in said business.

1. CONTRACTS: restraint of trade: consideration: validity.

Among the several grounds of objection to the granting of an injunction we regard two of them as material. They are as follows: "*First*, that the agreement in writing is void for want of consideration, as there is no money value inuring to the benefit of the defendants herein; and, *second*, that said contract by its terms is for the purpose of creating a monopoly in purchasing and selling butter at Storm Lake, and is, therefore, in restraint of trade, to the detriment of the producers and consumers of butter at that place and in that vicinity." The history of the law upon the question of contracts in restraint of trade is an interesting subject of investigation. The books abound in cases upon the subject. Anciently all contracts were void which in any degree tended to the restraint of trade, even in a particular locality, and for a limited time. This ancient rule has been so far modified that, although agreements in general restraint of trade are invalid, because they deprive the public of the services of the citizen in the occupation or calling in which he is most useful to the community, and expose the people to the evils of monopoly, and prevent competition in trade, yet an agreement in partial restraint of trade will be upheld where the restriction does not go beyond some particular locality, is founded upon a sufficient consideration, and is limited as to time, place and person. It is accordingly everywhere now held that when one engaged in any business or occupation sells out his stock in trade and good-will he may make a valid contract with the purchaser binding himself not to engage in the same business in the same place for a time named, and he may be enjoined and restrained from violating his contract. This is about as far as contracts in restraint of trade have been upheld by the courts in this country or in England. The general principles above announced will be found in all text-books upon contracts, and find support in many adjudged cases.

We have not thought it necessary to set out or cite the cases. They will be found collected in 3 American & English Encyclopedia of Law, page 882, and the same, volume 10, page 943; 2 Parsons on Contracts, page 747.

Applying these rules to the contract under consideration we are to inquire first whether there is a sufficient consideration for the promise of the defendants and the other parties who executed the instrument not to engage in dealing in butter at Storm Lake. It is very plain that there was no money paid to them as a consideration. The plaintiffs did not purchase any stock of butter which the defendants had on hand. They paid nothing for an established plant or place of doing business, nor for the good-will of any business. So far as appears they went into the town of Storm Lake and proposed to go into the butter business if the other persons then engaged in that business would agree to quit that line of trade for two years. In all the search we have made for authority upon this branch of the controversy we have found no warrant in any precedent for holding that this is a sufficient consideration. There are cases which hold, and the law is well settled, that, where a party proposes to expend money in erecting a manufactory or other plant which may be a public benefit, subscriptions in aid of the enterprise are valid obligations. But such contracts are widely different in principle from the agreement under consideration. Suppose the plaintiffs had made a proposition to the dry-goods merchants of Storm Lake that if they would all quit the business for two years, without any consideration being paid to them for so doing, the plaintiffs would establish a dry-goods store at that place, and the proposition had been accepted; it would be a marvelous decision if any court would hold that there was any consideration for such a contract.

II. But it appears to us that the decision of the district court is manifestly right upon the question that

2. —: —. the agreement is against public policy. It plainly tends to monopolize the butter trade at Storm Lake, and destroy competition in that business. It is not necessary that the enforcement of the agreement would actually create a monopoly in order to render it invalid, and surely where all the dealers in a commodity in a certain locality agree to quit the business, and the plaintiffs are installed as the only dealers in that line, the tendency is, for a time at least, to destroy competition, and leave the plaintiffs as the only dealers in that species of property in that locality. Such contracts cannot be enforced. AFFIRMED.

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## BOWNE & SLEEPER, Appellees, v. WILLIAM H. BILSLAND *et al.*, Appellants.

**Railroad Land Grant:** CONDITIONS: NON-PERFORMANCE: TITLE. By an act of congress approved in May, 1864, the United States granted to the state of Iowa certain lands in said state to aid in the construction of a railroad from Sioux City to a point on the south line of the state of Minnesota, the lands to be subject to the disposal of the legislature for that purpose and no other. Patents for one hundred sections of said lands were to be issued to said state, for the benefit of the railroad company entitled thereto, only when the governor of said state should certify to the secretary of the interior that a section of ten consecutive miles of such road had been completed, and in like manner for each section of ten consecutive miles, but if said roads were not completed within ten years from the date of their acceptance of the grant, the lands thereby granted, and not patented, were to revert to the state for the purpose of securing the completion of said roads, and if the state failed to complete said roads within five years thereafter, then the lands undisposed of as aforesaid were to revert to the United States. By chapter 134 of the acts of the general assembly of 1866, the state accepted said grant, and conferred the lands granted upon a certain railroad subject to the conditions named in the grant, which grant was accepted by the railroad on September 20, 1866. *Held*, that the grant did not operate to vest the legal title to the lands in the railroad company, and that the road not having been completed September 20, 1881, all of said lands not then patented in the manner aforesaid, nor otherwise disposed of, reverted to the United States.

*Appeal from O'Brien District Court.*—HON. C. H. LEWIS, Judge.

MONDAY, JUNE 1, 1891.

ACTION to recover for trespass by the defendants in wrongfully entering upon lands owned by the plaintiffs, and cultivating the same. The cause was tried without a jury, and judgment was rendered for the plaintiff. The defendants appeal.—*Reversed.*

*McCallum, Hughes & Hastings*, for appellants.

*O. M. Barrett* and *S. A. Calvert*, for appellees.

BECK, C. J.—I. Defendants deny the allegations of the plaintiffs' petition, and allege that they entered upon and held possession of the land under a homestead settlement, with the intent to acquire the lands under the homestead laws of the United States, and made application to the proper United States land officers to enter the land as homesteads; that the land officers refused to permit the entry, though, as the defendants allege, the land was subject to the homestead entry; that thereupon the defendants appealed from the decision; and the appeal has not been determined, but is pending before the commissioner of the general land-office; that the defendants' possession of the land is, and always has been, under their homestead settlement and claim; and that the plaintiffs have no patent or certificate for the land, and hold no legal or equitable title thereto. Other defenses, as another action pending, and a counterclaim for damages accruing by reason of the wrongful and malicious suing out of an attachment in this case, need not be more particularly mentioned. The issues arising upon the allegations of the answer which we have recited involve the question as to whether the plaintiffs have the right of

possession to the land. The plaintiffs claim under a railroad grant, and the defendants under the homestead statute of the United States. The consideration of the statutes pertaining to this grant, and the homestead claim of the defendants, demand our attention.

II. The plaintiffs' claim is based upon the act of congress of May 12, 1864, granting lands to the state of Iowa to aid in the construction of railroads therein specified. This statute, so far as its provisions need be considered in this case, is as follows:

"Sec. 1. That there be, and is hereby, granted to the state of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City, in said state, to the south line of the state of Minnesota, at such point as the said state of Iowa may select, between the Big Sioux and the west fork of the Des Moines river, also to said state, for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said state, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota state line, in the county of O'Brien, in said state, every alternate section of land designated by odd numbers, for ten sections in width, on each side of said roads; but, in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the secretary of the interior to cause to be selected, for the purpose aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land,

in alternate sections or parts of sections designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid; which lands thus indicated by odd numbers and sections, by the direction of the secretary of the interior, shall be held by the state of Iowa for the uses and purposes aforesaid; provided, that the lands so selected shall in no case be located more than twenty miles from the lines of said road: provided, further, that any and all lands heretofore reserved to the United States, by any act of congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the routes of said road through such reserved lands, in which case, the right of way shall be granted subject to the approval of the president of the United States.

"Sec. 3. That the lands hereby granted shall be subject to the disposal of the legislature of Iowa for the purpose aforesaid, and no other.

"Sec. 4. That the lands hereby granted shall be disposed of by said state for the purposes aforesaid only, and in manner following, namely: When the governor of said state shall certify to the secretary of the interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner, as a first-class railroad, then the secretary of the interior shall issue to the state patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles as aforesaid. When the governor of said state shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the secre-

tary of the interior shall issue patents to said state in like manner, for a like number; and, when certificates of the completion of additional sections of ten consecutive miles of either of said roads are from time to time made as aforesaid, additional sections of lands shall be patented as aforesaid, until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented to the state for the uses aforesaid, and none other; provided, that, if the said McGregor Western Railroad Company or assigns shall fail to complete at least twenty miles of its said road during each and every year from the date of its acceptance of the grant provided for in this act, then the state shall resume said grant, and so dispose of the same as to secure the completion of a road on said line, and upon such terms, within such time as the state may determine; provided, further, that, if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted, and not patented, shall revert to the state of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms, as the state shall determine; and, provided, further, that said lands shall not in any manner be disposed of or incumbered, except as the same are patented under the provisions of this act; and, should the state fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States."

The state, by an act of the general assembly (Acts of 1886, ch. 134), accepted the grant made by congress in the foregoing enactment, subject to the condition therein, and conferred the land granted to the Sioux City & St. Paul Railroad Company, subject to the conditions and restrictions of the grant, and the terms provided in the act relating to the character of the road to be constructed, and other matters, which need not

be stated. Chapter 34, Acts of 1874, directs and authorizes the governor "to certify to the Sioux City & St. Paul Railroad Company any and all lands which are now held by the state of Iowa in trust for the benefit of said railroad company in accordance with the provisions of section 2 of chapter 134 (p. 143) of the Laws of the Eleventh General Assembly." In 1873 a patent was issued by the United States conveying the land granted to the state "for the use and benefit of the Sioux City & St. Paul Railroad Company and its assigns, forever." In an action in the United States circuit court for the district of Iowa between the Sioux City & St. Paul Railway Company and others, and the Chicago, Milwaukee & St. Paul Company, involving the claims and rights of the parties in the action to the land, their conflicting claims and rights were settled, and a partition of some of the lands was made. But, as the state was not a party to the action, nor were the defendants in this suit, their rights were not affected by it. This case was finally decided by the United States supreme court. *Sioux City & St. P. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 117 U. S. 406; 6 Sup. Ct. Rep. 790. It demands no further mention.

The Sioux City & St. Paul Railway Company entered into a contract to convey the lands involved in the action, which are a part of the lands granted under the federal and state statutes referred to above. The defendant insists that this contract covers a part only of the land, and, to show that it covers all, the plaintiffs filed an amended abstract, which the defendants deny. We need not consume time with this controversy, as it becomes wholly unimportant in the view we take of the case. By a statute of the state (Acts of 1882, ch. 107,) the lands and the rights thereto, covered by the grants in question, so far as they have not been earned by a compliance with the terms of the grant, are reserved and declared to be as absolutely vested in the

state "as if the same had never been granted to the said railroad company." Chapter 71, Acts of 1884, relinquishes and conveys to the United States all the lands and rights resumed by and under the preceding act, excepting lands in Dickinson and O'Brien counties. The lands involved in this case, being in O'Brien county, do not come under the provisions of this statute. The secretary of the interior, in a proper case, decided the land in question, and other lands claimed by the railroad company under the congressional grant in question, were unearned and forfeited, and an action has been or is about to be commenced, by order of the secretary of the interior, to cancel all claims or rights of the railroad company to the land. Certain evidence was introduced as to the value, rental value, the production of the land, etc., pertaining to the measure of damage. Questions arising thereon, it will be readily seen, need not be considered, in the view we take of the case. It may be remarked in this connection that there is no evidence showing, or tending to show, that the railroad company earned the land in controversy under the grant; that it performed the work in building the road which, under the terms and condition of the grants (federal and state), would entitle it to demand that the lands be conveyed to it by patent or otherwise. In the opinion of the secretary of the interior in the case before us, involving the right of the railroad company to the land, which is in evidence in this case, it is found and held that the lands in question, including the lands involved in this suit, are unearned, and, therefore, the grant never attached to them.

III. The questions for determination in this suit involve the right and title of the railroad company to the land under the grants and acts of the federal and state governments, without regard to the fact of the non-performance of the terms of the grant,—the failure to earn the land by the company. Counsel for the

plaintiff states, in an argument adopted in this, though filed in another case (*Ayers v. Kolstrom*, 50 N. W. Rep. 550), involving the same questions presented in this one, the following position, upon which he bases the right of plaintiff to recover: "*First.* At the outset of this argument it may be conceded that, unless the plaintiff has established a valid and subsisting interest in the land in question, and a right to the immediate possession thereof, he cannot recover in this action." "That interest, whether legal or equitable, must be a valid and subsisting one, and coupled with the right to present possession. It must be a better title and right of possession than that of the defendants."

We do not present the quotation from counsel's argument as the correct rule of law applicable to the case. Indeed, we think it is incorrect, but its error need not be pointed out, for, as we shall show, the evidence fails to establish that the railroad company holds, or ever held, any valid and subsisting interest in the lands, legal or equitable, either with or without the right of present possession. The first section of the act of congress of May 12, 1864, above quoted, grants the land in question to the state "for the use and benefit of the railroad company for the purpose of aiding in the construction of a railroad," the route of which is specified in the act. Section 3 provides "that the lands hereby granted shall be subject to disposal by the legislature of Iowa for the purpose aforesaid, and no other." The fourth section imposes restrictions upon the disposal of the lands, to the effect that the lands shall be patented to the state as the work of building the railroad progresses, thus conveying specified quantities of land when given distances of the railroad should be built. It provides that, in case of a failure to complete the road as prescribed in the act, the state shall resume the grant, and dispose of the

lands to secure the building of the road; and it is further provided "that the lands shall not in any manner be disposed of or incumbered, except as the same are patented under the provision of the act; and, should the state fail to complete the road within five years after the ten years aforesaid, then the said lands, undisposed of as aforesaid, shall revert to the United States."

It does not clearly appear from the abstract in the case, if at all, when the Sioux City & St. Paul Railway Company accepted the grant made by the federal and state statutes herein quoted and referred to; but counsel for the plaintiffs, in their argument, submitted in both this cause and in *Ayers v. Kolstrom*, involving the same questions as in this case, state that the acceptance was September 20, 1866. It will be observed that, under section 4 of the act of congress of May 12, 1864, if the railroad should not be completed in fifteen years from that date, the grant reverts, under the provision of the act, to the United States. This section gives ten years to the railroad company to complete the road, and provides that, upon the failure of the company to build it in that time, the lands not patented shall revert to the state, and, if the state fail to complete the road within five years thereafter, the lands undisposed of shall revert to the United States. The railroad not having been completed September 20, 1881, the lands, not patented or otherwise disposed of, reverted to the United States. The state, in order to effectuate the conditions of the grant, default in the performance whereof terminated the grant, resumed the right to the land conferred upon the railroad company by chapter 107, Acts of 1882, and by chapter 71, Acts of 1884, reconveyed the lands to the United States, but the lands in question in this suit, being in O'Brien county, are excepted from the operation of the last statute by the provision therein.

IV. A brief consideration of the statutes and decisions of this court will make it absolutely plain that the grants, federal and state, in question, did not operate to vest the legal title to the lands in the railroad company. The grant is conditional, dependent upon the building of the road, and the legal title to the lands can only be passed to and acquired by the railroad, as they are earned by the construction of the road. The statutes do not alone, if the lands are unearned, operate to pass the legal title thereof to the railroad company. That title is not acquired until the conditions upon which the grant is made have been performed. This construction has been settled by express decisions of this court in cases wherein construction of these very statutes was brought in question. *Sioux City & St. P. Ry. Co. v. Osceola Co.*, 43 Iowa, 318; s. c., 50 Iowa, 177. See, sustaining the same doctrines: *Iowa Falls & S. C. Ry. Co. v. Cherokee Co.*, 37 Iowa, 483; *Goodrich v. Beaman*, 37 Iowa, 563; *Iowa Falls & S. C. Ry. Co. v. Woodbury Co.*, 38 Iowa, 499; *McGregor & M. R. Ry. Co. v. Brown*, 39 Iowa, 655. The act of congress grants the lands to the state for a specific purpose, and provides that title to and interest in the lands may be transferred to the railroad company, as prescribed in the act, upon the completion of parts of the road; but it is expressly declared that the land not earned by the railroad company shall revert to the United States. Now, these statutes do not provide for a forfeiture of lands and rights acquired by the railroad company, but that it shall acquire no legal title to the lands until they are earned. The state raised no claim to unearned lands, but, by a legislative act, reconveyed such lands to the United States. These considerations lead us to the conclusion that the plaintiffs have failed to show that they acquired legal title or right of possession in and to the lands

under their contracts with the railroad company. They cannot, therefore, recover in this action.

V. We do not determine that the plaintiff or the railroad company are not entitled to lands which were reserved by the state, and not certified or conveyed to the United States. The evidence before us fails to show that the lands in question are a part of such lands. Other questions, so ably argued by counsel, need not be discussed, as the points we determine are decisive of the case.

The judgment of the district court is REVERSED.

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## SIOUX CITY & ST. PAUL RAILROAD COMPANY, Appellant, v. LEWIS COUNTRYMAN, Appellee.

## THE SAME v. ADAM PHILLIPS, Appellee.

## THE SAME v. BAZEL D. BATTIN, Appellee.

## THE SAME v. WASHINGTON ROYER, Appellee.

1. **Railroad Land Grant:** CONDITIONS: PERFORMANCE: CONSTRUCTION. By an act of congress approved in May, 1864, the United States granted to the state of Iowa to aid in the construction of a railroad from Sioux City to the south line of the state of Minnesota, and also for the use and benefit of the McGregor Western Railroad Company to aid in the construction of a railroad from South McGregor in a westerly direction until it should intersect the said railroad running from Sioux City to the Minnesota line, every alternate section of land designated by odd numbers for ten sections in width on each side of said roads. Patents for one hundred sections of said lands were to be issued to the railroad companies whenever the governor of the state should certify to the secretary of the interior that any section of ten consecutive miles of either of said roads was completed, and likewise upon the completion of each succeeding section of ten consecutive miles of road until its completion, when the whole of said land should be patented to the state for the purposes aforesaid. If, however, said roads were not completed within ten years from the time of their acceptance of the grant, the lands thereby granted and not patented were to revert to the state for the purpose of securing the completion of said roads, and should the state fail to complete said roads within five years thereafter the lands undisposed

of as aforesaid were to revert to the United States. The state accepted the grant, and conferred the lands and interests granted upon the plaintiff; and in September, 1866, the plaintiff accepted the grant from the state. Before the close of 1872 the plaintiff completed a railway from a point on the south line of Minnesota to the town of LeMars, a distance of fifty-six and a quarter miles, and about two miles of main and side track in Sioux City. It also built in the latter place a roundhouse, machine and car shops, and other buildings, but never constructed a road from LeMars to Sioux City. It has operated trains, however, between those points over the track of another railroad. Patents were issued by the United States to the state of Iowa for an aggregate of about four hundred and seven thousand, eight hundred and seventy acres of land as inuring under the grant to the plaintiff, including the lands in controversy, and in pursuance of an act of the state legislature certificates have been issued to the plaintiff for three hundred and twenty-two thousand, four hundred and twelve, and eighty-one-hundredths acres, but not including the lands in controversy. Of the lands so certified to the plaintiff, forty-one thousand, six hundred and eighty-seven, and fifty-two-hundredths acres were by the decree of the federal court awarded to the Chicago, Milwaukee & St. Paul Railway Company, which claimed said lands under the same act of congress. In the year 1882, the state resumed the lands which had been conferred upon the plaintiff by said act of congress, and which had not been earned, and two years later it relinquished and conveyed the lands and rights resumed by the act of 1882 to the United States. In the year 1887 the governor certified to the secretary of the interior, in accordance with the requirements of the act last mentioned, a list of about twenty-six thousand acres of land, including that in controversy. The lands so certified were restored to entry under the settlement laws of the United States in August, 1887, and the defendants claim certain portions thereof under the homestead and pre-emption entries. The plaintiff having brought this action to quiet its title to the lands thus entered, based upon said act of congress and the grant from the state, *held*, that the grant from the state to the plaintiff was necessarily limited by the conditions imposed by the act of congress, and that the right remained in the state to resume control of all lands not earned by the plaintiff within ten years from the acceptance of the grant, although such right was not specifically reserved by the state, and that the state had properly relinquished its title to the United States.

2. ———: ———: ———: ———. The plaintiff having failed to complete its road to Sioux City as provided by said act of congress, and until completion being entitled only to land for each completed section of ten consecutive miles of road built, *held*, that it was not entitled to the lands in controversy on account of the last six and a quarter miles of road constructed on its line to LeMars, nor for the part of the road and improvements built in Sioux City. Neither

could the plaintiff claim said lands as a part of the indemnity lands, which it had earned by the construction of the fifty miles of road, upon the ground that the award of a portion of said lands to the Chicago, Milwaukee & St. Paul Railway Company was a sale or appropriation within the meaning of a provision of said act of congress that, if it should appear that the United States had sold any part of the lands granted by said act, or that they had been reserved by the United States for any purpose whatever, then the secretary of the interior should cause to be selected other lands in lieu thereof.

*Appeals from Woodbury District Court.*—HON. GEORGE W. WAKEFIELD, Judge.

MONDAY, JUNE 1, 1891.

EACH of these actions involves the title to a quarter section of land claimed by the plaintiff under a railroad grant, and by the defendant by virtue of an entry made under the laws of the United States. The plaintiff asks that the entries be vacated, that the defendants be enjoined from attempting to acquire title by virtue of their entries, and that the title of the plaintiff be quieted. Judgment was rendered in each case in favor of the defendant, and the plaintiff appeals. The questions in controversy are common to all the cases, and they are submitted together on one abstract.—*Affirmed.*

*J. H. & C. M. Swan*, for appellant.

*M. B. Davis*, for appellees.

ROBINSON, J.—The claim of title made by the plaintiff is based upon the following: An act of congress, entitled "An act for a grant of lands to the state of Iowa, in alternate sections, to aid in the construction of a railroad in said state," approved May 12, 1861; chapter 134 of the Acts of the Eleventh General Assembly of the state of Iowa; an alleged compliance with the requirements of said acts; patents issued by

the United States to the state of Iowa; and chapter 34 of the Private, Local and Temporary Acts of the Fifteenth General Assembly of Iowa. The defendants, Countryman and Phillips, claim title under homestead entries, made on the twelfth day of September, 1887; and the defendants, Royer and Battin, claim, by virtue of pre-emption, entries made on the same date. Those portions of the act of congress specified which we need to consider are as follows:

"Be it enacted * * * that there be and is hereby granted to the state of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City, in said state, to the south line of the state of Minnesota; * * * also to said state for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said state, in a westerly direction, by the most practicable route, on or near the Forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota state line, in the county of O'Brien, in said state, every alternate section of land designated by odd numbers, for ten sections in width, on each side of said roads; but in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section or any part thereof, granted as aforesaid, * * * or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the secretary of the interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated * * * as aforesaid, which lands, thus

indicated by odd numbers and sections, by the direction of the secretary of the interior, shall be held by the state of Iowa for the uses and purposes aforesaid; provided, that the lands so selected shall in no case be located more than twenty miles from the lines of said roads; provided, further, that any and all lands heretofore reserved to the United States, by any act of congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act."

"Sec. 4. The land hereby granted shall be disposed of by said state for the purposes aforesaid only, and in manner following, namely: When the governor of said state shall certify to the secretary of the interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner as a first-class railroad, then the secretary of the interior shall issue to the state patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles as aforesaid. When the governor of said state shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the secretary of the interior shall issue patents to said state in like manner for a like number; and, when certificates of the completion of additional sections of ten consecutive miles of either of said roads are from time to time made as aforesaid, additional sections of land shall be patented as aforesaid, until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented to the state for the uses aforesaid and none other: * * * provided, further, that, if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to

the state of Iowa for the purpose of securing the completion of said roads within such time, not to exceed five years, and upon such terms as the state shall determine; * * * and, should the state fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

"Sec. 5. * * * As soon as the governor of said state of Iowa shall file or cause to be filed with the secretary of the interior maps designating the routes of said roads, then it shall be the duty of the secretary of the interior to withdraw from market the lands embraced within the provisions of this act."

Chapter 134 of the Acts of the Eleventh General Assembly accepted the grant "upon the terms, conditions, and restrictions" contained in the act of congress. Section 2 conferred "so much of the lands, interests, rights, powers and privileges, as are or may be granted" in pursuance of the act of congress upon the plaintiff "for the purpose of aiding in the construction of a railroad from Sioux City, in the state of Iowa, to the south line of the state of Minnesota." Chapter 144 of the acts of the same general assembly also accepted the grant, and further provided as follows:

"Sec. 2. Whenever any land shall be patented to the state of Iowa in accordance with the provisions of the said act of congress, said lands shall be held by the state in trust for the benefit of the railroad company entitled to the same by said act of congress, and to be deeded to said railroad company as shall be ordered by the legislature of the state of Iowa at its next regular session, or at any other session thereafter."

On the twentieth day of September, 1866, the plaintiff filed in the office of the secretary of the state of Iowa an acceptance of the grant, and in July, 1867, it filed in the same office and in the department of the

interior a map showing the location of its proposed road. In August of that year the lands which were claimed to be included in the grant were withdrawn from market. Before the close of the year 1872 the plaintiff completed a railway from a point on the south line of the state of Minnesota to LeMars, a distance of fifty-six and one-fourth miles, and about two miles of main and side track in Sioux City. It has also built in the place last named a roundhouse, machine and car shops, and other buildings, of the value of one hundred thousand dollars, but has never constructed a road from LeMars to Sioux City. It operates trains between those places—a distance of twenty-four miles—over the track used by the Illinois Central Railway Company. The governor of this state duly certified the completion of five sections of ten miles each, commencing at the south line of the state of Minnesota, as contemplated by the act of congress; and also certified to the completion of the road from the point of commencement to LeMars. Patents were issued by the United States to the state of Iowa for an aggregate four hundred and seven thousand, eight hundred and seventy and twenty-one-hundredths acres of land as inuring under the grant to the plaintiff, including the lands in controversy. The Fifteenth General Assembly, by chapter 34 of its private, local and temporary acts, directed the governor to certify to the plaintiff all lands which were then held by the state of Iowa in trust for its benefit in accordance with section 2 of chapter 134 of the Acts of the Eleventh General Assembly. Certificates have been issued to the plaintiff under that statute for three hundred and twenty-two thousand, four hundred and twelve and eighty-one-hundredths acres of land, but not for the land in controversy. Of the lands so certified a large quantity was claimed by the Chicago, Milwaukee & St. Paul Railway Company under a grant made by the same act of congress under

which the plaintiff claims. In an action in the federal courts, in which said company was the plaintiff, and the plaintiff in these actions and others were defendants, it obtained a decree awarding to it forty-one thousand, six hundred and eighty-seven and fifty-two-hundredths acres of the lands which had been certified to the plaintiff. In the year 1882 the general assembly enacted a law to resume the lands which had been conferred upon the plaintiff under the act of congress of 1864, and which had not been earned. Two years later a law was enacted by the general assembly relinquishing and conveying the lands and rights resumed in the year 1882 to the United States, and directing the governor to certify to the secretary of the interior all lands which had been patented to the state to aid in constructing a railroad from Sioux City to the south line of Minnesota, but had not been patented by the state to the plaintiff. Lands in Dickinson and O'Brien counties were excepted from the provision of that act. In January, 1887, the governor certified to the secretary of the interior, in accordance with the requirements of the act last specified, a list of twenty-six thousand, seventeen and thirty-three-hundredths acres of lands, including that in controversy. The lands so certified were restored to entry under the settlement laws of the United States in August, 1887, and the entries were made by the defendants as already stated.

I. The act of May 12, 1864, when the trust it created was accepted by the state of Iowa, conferred a right to all the lands contemplated by the act, upon the conditions therein specified. *Leavenworth, L. & G. Ry. Co. v. United States*, 92 U. S. 733; *Grinnell v. Railway Co.*, 103 U. S. 739; *Goodnow v. Wells*, 67 Iowa, 658. The lands included in the grant were to be ascertained by survey, and the location of the lines of road it was intended to aid as to the lands in place and

1. Railroads: land grant: conditions: performance: construction.

by appropriate selection as to indemnity lands. *Sioux City & St. P. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 117 U. S. 406; 6 Supt. Ct. Rep. 790, and cases therein cited; *Ryan v. Railway Co.*, 99 U. S. 382. The grant from the state to the plaintiff was as broad in terms as that made by the act of congress. Acts, 11th Gen. Assem., sec. 2, ch. 134. But it was necessarily limited by the conditions attached to the grant to the state. The lands were subject to disposal by the legislature only for the purpose of aiding in the construction of a railroad from Sioux City to the south line of the state of Minnesota. None of them were to be disposed of until the governor should certify to the secretary of the interior that a section of ten consecutive miles of road had been completed in the manner required by the act of congress, and upon that certificate it was the duty of the secretary to issue to the state patents for one hundred sections of land for the benefit of the road which had completed the section, and subsequent patents were to be issued in like manner upon similar certificates. The lands granted were not to be in any manner disposed of or incumbered except as they were patented. In case the road was not completed within ten years from the acceptance of the grant, the lands granted and not patented were to revert to the state for the purpose of securing the completion of the road; and, if the state failed to complete the road within five years after the expiration of the ten years aforesaid, the lands undisposed of were to revert to the United States. It is plain that it was not the intent of congress to authorize the state to transfer to the plaintiff title to the land excepting as it should be earned according to the conditions imposed in the granting act. See *S. C. & P. Ry. Co. v. Osceola Co.*, 50 Iowa, 178. No attempt on the part of the state to transfer to the plaintiff an interest not authorized by the act of congress would have been effectual. *Schulenberg*

*v. Harriman*, 21 Wall. 44; *Farnsworth v. Railway Co.*, 92 U. S. 49; *Jackson, L. & S. Ry. Co. v. Davison*, 65 Mich. 416; 32 N. W. Rep. 733. That an interest was created by the act of the general assembly which designated plaintiff as beneficiary of the grant, and by the acceptance of the provisions of that act by the plaintiff, is undoubtedly true; and we are of the opinion that such interest ripened into an equitable title at least to all the lands which were subsequently earned in the manner provided by the act. But the right remained in the state to resume control of all lands not earned within ten years from the acceptance of the grant, and that right was not impaired by the fact that in the grant from the state to the plaintiff the right to resume was not specifically reserved. It existed by virtue of the act of congress, and could not be relinquished to the plaintiff by the state. The right of the state to resume control of the lands which were unpatented and unearned within the ten years allowed to the plaintiff in which to complete its road was properly exercised by legislative enactment. *Schulenberg v. Harriman*, 21 Wall. 44; *United States v. De Repentigny*, 5 Wall. 267. That there was delay in resuming such control is a matter of which the plaintiff has no right to complain; nor can it question the effectiveness of the resumption. It was also proper for the state, by the means it adopted, to relinquish to the United States the color of title which it held to the unearned lands through the act of May 12, 1864, and the patent issued thereunder.

II. The appellant contends that it has earned the lands in controversy, and is entitled to them for that reason. They are not within the ten-mile limits of this grant; but it seems to be conceded that they are within twenty miles of the line of road as originally platted by the plaintiff. Although the plaintiff constructed fifty-six and one-fourth miles of road from the south line

of the state of Minnesota to LeMars, and a little more than one mile of main track in Sioux City, it is entitled to land only for five completed sections of road of ten miles each. The line which the grant was designed to aid was to be constructed from Sioux City to the south line of the state of Minnesota. The plaintiff was entitled to land for each completed section of ten consecutive miles of road, but to nothing for less than such a section until the road should be fully completed. It is not pretended that the road has been completed as contemplated by the act of congress; therefore, the plaintiff is entitled to nothing on account of the last six and one-fourth miles constructed on the line to LeMars; nor is it entitled to anything for that part of the road built in Sioux City, and the improvements there made.

If the plaintiff is entitled to the lands in controversy it must be for the reason that they are a part of the indemnity lands which have been earned by reason of the construction of fifty miles of road. The first two certificates of the governor show that the three sections first completed commenced at the Minnesota line, and extended thence in a southerly direction towards Sioux City. The certificate as to the fourth and fifth sections does not show that they continued the line of the first three sections; but, in the absence of proof to the contrary, we will presume that the five sections certified formed a continuous line of fifty miles southward from the south line of the state of Minnesota where it connected with the St. Paul & Sioux City road, and with which it was operated as a continuous line. The number of acres certified by the governor to the plaintiff was, as has been stated, three hundred and twenty-two thousand, four hundred and twelve and eighty-one-hundredths. But the act of May 12, 1864, also granted to the state certain lands to aid in the construction of a railroad from South McGregor

westward to a point of intersection with the road to be built from Sioux City, in the county of O'Brien, and the limits of the two grants included the same land in the neighborhood of the point of junction. A conflict between the claimants under the grant was settled by the decision in the case of *Sioux City & St. P. Ry. Co. v. Chicago, M. & St. P. Ry Co.*, 117 U. S. 406; 6 Sup. Ct. Rep. 790, and resulted in giving to the Milwaukee Company forty-one thousand, six hundred and eighty-seven and fifty-two-hundredths acres of the land which had been certified to the plaintiff. The amount of land it has received for building the five completed sections of its road thus appears to be two hundred and eighty thousand, seven hundred and twenty-five and twenty-nine-hundredths acres, instead of three hundred and twenty thousand, which it claims. But we do not think plaintiff is entitled to the quantity of land which it claims. The act of congress granted to the state for the purpose of aiding in the construction of the two railroads described every odd-numbered section of land within the limits specified, and provided that if it should appear, when the roads were located, that the United States had sold any part of such sections, or that the right of pre-emption or homestead settlement had attached to them, or that they had been reserved by the United States for any purpose whatever, then the secretary of the interior should cause to be selected other lands in lieu of those sold, reserved or otherwise appropriated. We are of the opinion that the sale, reservation and appropriation contemplated by the act cannot be held to be anything which was affected by the act itself, but to some disposition of the land made under other provisions of law. The granting to the state for the benefit of each road of a moiety of the odd-numbered sections within the overlapping ten-mile limits was not a sale, reservation or other appropriation of the land within the meaning of the act. In other words, it was the intent

of congress to grant for the benefit of each road but half as much land within as without such overlapping limits. Section 4, considered by itself, seems to authorize a different conclusion, but it must be construed in connection with the remainder of the act.

It follows from what we have said that the right to select for the plaintiff lands within the indemnity limits for those portions of the odd-numbered sections within the overlapping ten-mile limits which belonged to the Milwaukee Company did not exist. The number of acres of such land awarded to the Milwaukee Company in the suit to which we have referred was twenty-five thousand, two hundred and sixty-nine and eighty-six-hundredths; but in an instrument prepared by the secretary of the interior, and introduced in evidence, it is stated that there are within the overlapping ten-mile limits of the two grants seventy thousand, three hundred and forty-five and sixty-seven-hundredths acres. Accepting that as the true amount, it appears that plaintiff is entitled to two hundred and eighty-four thousand, eight hundred and twenty-seven and seventeen-hundredths acres of land for the five completed sections of its road, or four thousand and one hundred and one and eighty-eight-hundredths acres more than it has received. There were patented to the state as inuring under the grant to the plaintiff, but not certified to it, eighty-five thousand, four hundred and fifty-seven and forty-hundredths acres. Of that amount, thirty-seven thousand and seven hundred and forty-seven and eighty-nine-hundredths acres have been awarded by the decree of the federal courts to the Milwaukee Company, and twenty-six thousand, seventeen and thirty-three-hundredths appear to have been certified to the secretary of the interior as falling within the provisions of the act of the general assembly of 1884, leaving twenty-one thousand, six hundred and ninety-two and eighteen-

hundredths acres still held by the state to satisfy the grant to the plaintiff, or more than five times the amount to which it appears to be entitled. The issuing of the patents to the state for more land than the plaintiff had earned seems to have been the result of a mistake of fact. But, however that may be, the plaintiff acquired no title to the excess so patented. There has been a partial adjustment between the United States and the state of Iowa, and the latter has relinquished to the former a part of the excess, including the land in controversy. Since the authorities charged with the duty of selecting the land to which the plaintiff is entitled have decided that the land relinquished had not been earned, the burden is upon the plaintiff to show the title it asserts, for it must be presumed that the deficiency in its grant must be made up from land, the title to which appears to be vested in the state for that purpose. But the plaintiff has wholly failed to show any reason for holding the land in controversy rather than the land still held by the state. It is not shown to be nearer the tiers of sections within the ten-mile limits than any other land available to satisfy the grant. None of it is within twenty miles of the five completed sections of road, and none of it is within twenty miles of the terminus of the road at LeMars if the distance be measured by section lines. Whether the plaintiff is entitled in any event to land located more than twenty miles from its completed line is a question which we do not find it necessary to determine. In our opinion the plaintiff has failed to show that it has earned the tracts of land claimed by the defendants.

The judgment of the district court in each case is, therefore, AFFIRMED.

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# MINNIE STONE, Appellant, v. MARTIN MOORE, Appellee.

1. **Practice in Supreme Court:** VERDICT: CONFLICT OF EVIDENCE. Where there is an irreconcilable conflict in the evidence in a cause the supreme court will not reverse a judgment and order a new trial upon the ground that the verdict and judgment are not supported by the evidence.

2. **Assault:** DAMAGES: EVIDENCE. In an action for damages sustained from an assault made upon the plaintiff by the defendant the plaintiff claimed that at the time of the assault she was pregnant, and that the abuse of the defendant produced an abortion, and injured her health to such a degree as to render her unable to perform the labor which before that time she was accustomed to do. *Held*, that a non-expert witness for the plaintiff, who was acquainted with her, and saw her frequently, was properly permitted to testify that the plaintiff's physical condition was one of feebleness and inability to do hard work.

3. ———: ———: TESTIMONY OF EXPERTS. A female physician who had attended a regular medical school, and has practiced her profession, but who had since abandoned the regular practice of medicine and adopted Christian Science as the proper method of healing the sick, *held*, to be competent to testify as an expert as to the result of her examination of the plaintiff, and to state the symptoms complained of by her.

4. **New Trial:** NEWLY DISCOVERED EVIDENCE. A new trial will not be granted upon the ground of newly discovered evidence when such evidence is merely cumulative, or is of such a nature as should have been discovered before or during the trial.

*Appeal from Cedar Rapids Superior Court.*—HON. JOHN T. STONEMAN, Judge.

MONDAY, JUNE 1, 1891.

THIS is an action for damages for an alleged assault and battery inflicted upon the plaintiff by the defendant. There was a trial by jury, and a verdict and judgment for the plaintiff for five hundred dollars. The defendant appeals.—*Affirmed.*

*M. P. Smith*, for appellant.

*Warren Harman*, for appellee.

ROTHROCK, J.—I. Numerous objections are made by the appellant to rulings of the court during the trial. A number of the alleged errors are found to have no place in the record. The appellee filed an additional abstract, which shows that fact, and the parties stipulated that where the abstracts are in conflict that of the appellee is to be taken as correct. We will proceed to consider such alleged errors as are to be found in the case as presented by the parties, and which appear to demand the attention of this court.

1. PRACTICE in supreme court: verdict: conflict of evidence.

If credence is to be given to the testimony of the plaintiff the defendant committed an outrageous assault upon her in her own house, and struck her twice with a horsewhip, and used violent and indecent language to her. She and her husband lived in a house which they rented from the defendant, and she claims that the defendant's ostensible purpose in visiting the house was to collect rent. She claimed that at the time of the assault she was pregnant, and that the abuse of the defendant produced an abortion, and injured her health to so great a degree as to render her unable to perform the labor which before that time she was accustomed to do. The defendant, in his testimony, denied that he made any assault upon the plaintiff, and denied that he was at or near the house of the plaintiff at the time when the alleged assault was committed. In other words he relied upon an *alibi*. He was corroborated by other witnesses to some extent as to his whereabouts on the day of the alleged assault. We are asked to reverse the judgment because it is not supported by the evidence. We have stated enough of the

facts sworn to by the witnesses on the trial to demonstrate that we cannot interfere with the verdict. The evidence presented an unmistakable and irreconcilable conflict, and having been passed upon by the jury, and undergone the scrutiny of the learned judge who tried the case, we cannot say that the court erred in overruling the motion for a new trial on this ground.

II. A witness for the plaintiff, who appears to have been acquainted with her, and had become interested in her condition, and saw her frequently, was asked if she knew the physical condition of the plaintiff at the time of the trial. The question was objected to because it was not shown that the witness was a physician, or familiar with the science of medicine. The objection was overruled, and the witness answered: "I know it [plaintiff's condition] to be one of feebleness and inability to do hard work." It appears to us that there is no valid objection to the ruling of the court in permitting this evidence to be introduced. The question did not call for the opinion of a medical expert. It was evidence of a fact open to the observation of anyone who was familiar with the plaintiff and accustomed to observe her appearance and movements. That the evidence was competent, see *Tierney v. Minn. & St. L. Ry. Co.*, 33 Minn. 31; 23 N. W. Rep. 229; *State v. Shelton*, 64 Iowa, 333; Lamen on Expert Evidence, 466.

2. ASSAULT: damages: evidences.

III. A female physician, named Bushnell, was examined as a witness for the plaintiff. It appears from the testimony of this witness that she attended a regular medical school, and that she practiced her profession for some three years. The plaintiff, after her alleged injury, was examined by the witness, who was permitted, over the objection of the defendant, to state the result of her examination, including the symptoms complained of by the plaintiff. It is claimed that this was error. There

3. ——: ——: testimony of experts.

was surely no more valid objection to this evidence than there would have been if it had been given by any other physician, and it is well settled that it is competent for a physician to state the complaint made by a patient as part of the diagnosis of the case. It further appears from the testimony of this witness that a short time before she was consulted as a physician by the plaintiff she (the witness) had abandoned the regular practice of medicine, and that she had adopted Christian Science as the proper method of healing the sick. She treated the plaintiff by that method, and she was permitted to state to the jury that her services to the plaintiff were worth from twenty-five dollars to thirty-five dollars. It is claimed that the idea which is entertained by some that the sick may be healed by what is called "Christian Science" is a humbug and a fraud. This may be true, but this question cannot be judicially determined without evidence, especially when it arises in a case in a collateral way. If this plaintiff honestly believed that she could be benefited by the treatment of this female physician it is not for a court to judicially determine that she ought to have secured the services of a physician of any particular class or kind. If she had in good faith called in a "root and herb doctor," or a "steam doctor," or one who claimed to cure the "ills to which flesh is heir" by any other method, the courts will not determine that she ought to have employed another.

IV. The defendant complains of the court's instructions to the jury. We have carefully examined these alleged errors, and our conclusion is that they ought not to be the subject of objection. When considered in connection with the appellee's abstract of the pleadings it appears that there was no prejudice to the defendant in any part of the charge to the jury.

V. One ground of the motion for a new trial was based upon alleged newly discovered evidence. This

4. NEW TRIAL: newly discovered evidence.

evidence consists of a number of affidavits, in which the affiants state certain facts which, upon a trial, would be proper evidence. Nearly all of this evidence is, however, merely cumulative. It is of the same kind and to the same point as much of the evidence introduced by the defendant on the trial. That which is not cumulative, it appears to us, ought to have been discovered by the defendant before or during the trial. We need not set out these affidavits, nor further elaborate the case.

The judgment of the district court is AFFIRMED.

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## E. S. POTTER, Appellant, v. OLIVE DOUGLASS *et al.*, Appellees.

**Trusts**: MISAPPROPRIATION OF TRUST FUNDS: LIMITATION OF ACTIONS. Where a guardian purchased real estate in her own name with money belonging to her ward, after the latter became of age, *held*, that such use of the ward's money by the guardian amounted to an appropriation thereof to her own use, for which a cause of action at once arose in favor of the ward, but that after such right of action had become barred by the statute of limitations the ward was not entitled to assert her ownership to said property as against the heirs of the guardian.

*Appeal from Johnson District Court.*—HON. S. H. FAIRALL, Judge.

MONDAY, JUNE 1, 1891.

THIS is an action for a partition of certain lands and town lots. Upon a trial on the merits, the petition and a cross-bill filed by one of the defendants were dismissed. The plaintiff and this defendant appeal. *Reversed.*

*Milton Remley*, for appellant.

*Robinson & Patterson* and *G. A. Ewing*, for appellees.

BECK, C. J.—I. The petition alleges that one Mary J. Potter, in November, 1888, died seized of the real estate involved in this suit, and that the defendant, Olive Douglass, her daughter, and the plaintiff, her husband, survived her, and now, as tenants in common, hold title to the real estate. It is also alleged that the defendant, Milton Remley, holds a mortgage executed on the land by the plaintiff. This defendant files a cross-bill, alleging that he holds the mortgage referred to in the petition, and prays that it may be foreclosed. The defendant, Olive Douglass, alleges in her answer that she inherited certain lands from her father, Jacob Spilter, who was the first husband of her mother; that her mother was appointed her guardian, and in that capacity exchanged the land inherited by the defendant for other land and a large amount of money; and that her mother received other large sums of money, the proceeds of the property which the defendant had inherited, and which she invested in the purchase of the lands in controversy. She alleges in her answer, upon these facts, that her mother held the land in trust for her, and that, therefore, the plaintiff never acquired title to the land. The plaintiff denies the allegations of the petition to the effect that the land was acquired with money of the defendant, and alleges that the action is barred by the statute of limitations.

II. It may be assumed, though we think such conclusion extremely doubtful, that the real estate in question was purchased with money of the defendant, received by her mother as guardian; but we think the plaintiff is entitled to the relief prayed for, on the ground that the bar of the statute of limitations defeats the defendant's claim, based upon the alleged trust arising by reason of the real estate having been purchased with her money. The defendant attained her majority in 1874. The money of the defendant, which she alleges was paid for the real estate, was received in

1875 and in 1883. The use of the money in the purchase of the real estate in the mother's own name was an appropriation thereof to her own use, and was a repudiation of the defendant's rights as a *cestui que trust*, whereon a right of action at once arose; and this rule applies whether the trust be expressed or implied. *Gebhard v. Sattler*, 40 Iowa, 152; *Peters v. Jones*, 35 Iowa, 512; *Humphreys v. Mattoon*, 43 Iowa, 556; *Harbour v. Rinehart*, 39 Iowa, 672; Angell on Limitations, sec. 174, *et seq.* There is no claim made by the defendant of any concealment or fraud whereby she was kept in ignorance of the existence of her right of action, which arrested the running of the statute of limitations.

The conclusion we have reached disposes of the case as presented, both upon the plaintiff's petition and defendant Remley's cross-bill. The defendant can set up the alleged trust to defeat neither. The decree of the district court, dismissing the plaintiff's petition and the defendant's cross-bill, is reversed, and the cause remanded for proceedings in harmony with this opinion, granting the relief to each separately prayed for by the plaintiff in his petition, and the defendant Remley in his cross-bill. REVERSED.

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# WILLIAM J. LEMP, Appellee, v. NIXON FULLERTON, Sheriff, Appellant.

1. **Intoxicating Liquors:** ORIGINAL PACKAGES: POLICE REGULATIONS: REPLEVIN. Where intoxicating liquors shipped from a foreign state into this state for sale in the original packages, prior to the enactment of the act of August 8, 1890, fifty-first congress (26 Stat. L. 313), were seized under a search-warrant issued in pursuance of the police regulations of the state, they could not be taken from the officer making the seizure under a writ of replevin.

2. **Justice's Court:** CONTINUANCE: JURISDICTION. After the plaintiff had commenced this action of replevin and the plaintiff had appeared before the justice who had issued the search-warrant, and joined issue

upon the question of his right to the liquors seized thereunder, the justice ordered upon the motion of the defendant herein that the case stand continued to a date over five months hence, until the district court could determine the rights of the parties under the writ of replevin. *Held*, that the right of the justice to make such order could not be determined in this case.

3. **Practice:** MOTION FOR JUDGMENT: EVIDENCE. Where in an action of replevin issue was joined as to the value of the property in question, but the evidence as to its value was without conflict, *held*, that the defendant being entitled to judgment upon the evidence, his motion to take the case from the jury and for judgment for the value of the property thus shown should have been sustained.

*Appeal from Des Moines District Court.*—HON. CHARLES H. PHELPS, Judge.

MONDAY, JUNE 1, 1891.

ACTION to recover the possession of specific personal property. By direction of the court, the jury returned a verdict in favor of the plaintiff, and judgment was rendered thereon. The defendant appeals. *Reversed.*

*Newman & Blake*, for appellant.

*S. L. Glasgow*, for appellee.

ROBINSON, J.—In the year 1889 the plaintiff was a brewer, engaged in business in St. Louis. In May of that year he shipped from St. Louis to Burlington, consigned to himself, a carload of beer. His agents at Burlington were Werthmueller & Ende. After the car containing the beer had been placed on a sidetrack at Burlington, it was opened by the agents named, but on the fifteenth day of May, before the beer had been removed, and while it was in the original casks in which it had been shipped, a part of it, including that in controversy, was seized by the defendant, as sheriff, by virtue of a search-warrant issued under the provisions of section 1544 of the Code. The information on

which the search-warrant was issued charged that the intoxicating liquors which it described were owned by Werthmueller & Ende. After the defendant made his return on the search-warrant, the justice of the peace who had issued it caused notice to be given to Werthmueller & Ende, and to all others whom it might concern, to appear at his office on the twenty-fourth day of May, to show cause, if any they had, why the liquors seized should not be forfeited. On the day fixed for the hearing the plaintiff appeared in the justice's court, and filed a pleading, in which he alleged that he was the owner of the property in controversy; that it was shipped from Missouri to Iowa, and seized by the sheriff while in the original packages, and before it had been delivered by the railway company; that it had not been sold, nor kept for sale, in violation of the laws of Iowa. On the sixteenth day of May this action was commenced, and the property in controversy was surrendered to the coroner. After the plaintiff in this action had filed the pleading described in justice's court, the state moved for a continuance, and as ground for the motion showed that this action had been commenced, and that the property seized by the sheriff under the search-warrant had been taken from him, and was not at that time under his control, nor subject to the order of the court. The court thereupon sustained the application, and continued the case until November 5, 1889, "to enable the district court to make some adjudication in the replevin suit." It was further ordered that, if the suit should be still pending at the date to which the cause was continued, then it should be subject to a further continuance, on the request of the state. On the fifth day of November, 1889, the cause was continued to the next day by the justice, on account of the general election. On the sixth day of November, there being no appearance by the claimants, the property in controversy was adjudged to be for-

feited. When the coroner attempted to serve the writ of replevin, the sheriff at first refused to surrender the property. Thereupon an application was made to the court from which the order issued, which recited the refusal of the sheriff and asked that he be required to show cause why he should not be punished for contempt. The court upon that application ordered the sheriff forthwith to deliver to the coroner the property in controversy, and that order was obeyed. The defendant asked the court, by motion, to cancel that order, but the motion was overruled. In September, 1889, the defendant filed his answer. In January, 1890, the plaintiff filed a reply, and the trial of the cause was commenced to a jury. After all the evidence had been introduced, the defendant asked the court to direct the jury to return a verdict for him, but was refused. The court then, upon its own motion, instructed the jury to return a verdict for the plaintiff, which was done.

I. The plaintiff contends that the law under which the seizure was made by the defendant is unconstitutional, and relies upon the case of *Leisy v. Hardin*, 135 U. S. 100; 10 Sup. Ct. Rep. 681, as sustaining his claim. In that case the supreme court of the United States held that a citizen of one state has a right to import intoxicating liquor into another state, and there sell it in original packages, notwithstanding a prohibition of the statutes of the state into which the liquor was imported, and in which it was sold. So far as such statutes prohibit transactions of that kind, they were held to be in conflict with the constitution of the United States, and, therefore, void. But it was not held that a state may not enforce its police regulations against traffic in liquor which is not in the nature of interstate commerce. The state has the right to enforce such regulations, and one of the means provided is a proceeding by search-warrant, such as was adopted in regard

1. INTOXICATING liquors: original packages: police regulations: replevin.

to the liquor in controversy. It may be conceded that such liquor was prohibited from forfeiture by reason of the rule announced in the *Leisy case*, and that upon the final hearing before the justice it should have been restored to the plaintiff. But the object of the proceeding was to ascertain if a law of the state was being violated, not to declare forfeited property which was not subject to its provisions. In such a case, if the court errs, the party aggrieved has the right of appeal. The proceeding cannot, however, be ignored nor treated as a nullity. It is a duly constituted means of ascertaining and determining the rights of the respective parties in interest, including the right of the owner of the property to claim it as exempt from the operation of the state laws, and the decision of the court is binding, as in other cases. It follows from what we have said that the search-warrant was properly issued, and the property in controversy was rightfully in the hands of defendant when this action was commenced and the writ of replevin was issued. It was said in *Funk v. Israel*, 5 Iowa, 438, 450, that liquors seized by virtue of a search-warrant issued under a statute substantially the same as section 1544 of the Code could not be replevied. That decision was approved in *State v. Harris*, 38 Iowa, 242, 246. It was said in the case last cited that the writ of replevin was not a lawful process for taking property from the possession of an officer rightfully holding it, under a writ properly issued in a criminal proceeding. We conclude that the writ of replevin was wrongfully sued out in this case, and that the court had no power to cure the defect by ordering the sheriff to deliver the property in question to the coroner.

II. It is urged that the action of the justice in continuing the proceedings in connection with the search-warrant from May 24 to November 5, 1889, was unauthorized, and that by so doing he lost jurisdiction of the case.

2. JUSTICE'S COURT: CONTINUANCE: JURISDICTION.

When this action was commenced, the justice's court had jurisdiction of the property in controversy. It was in the custody of the law, subject to the further order of that court. The proceedings of that court were entirely regular, until after plaintiff had appeared and pleaded. When he entered his appearance the court had complete jurisdiction of both the person and property of the plaintiff in this action. If it exceeded its jurisdiction in granting the continuance demanded, the plaintiff had an appropriate remedy for correcting the error by direct proceedings. We cannot in this action inquire into that question. In our opinion, on the undisputed evidence, the motion of the defendant for a verdict in his favor should have been sustained.

III. The petition alleges that the value of the property in controversy is two hundred dollars. The answer alleges that it is worth more than that sum. On the trial the defendant conceded that it was of the value alleged in the petition. Evidence was given on behalf of the plaintiff to the same effect. The defendant, in his motion for a verdict, asked that the value of the property be fixed "at the sum testified to." Since there was practically no dispute as to the value, the defendant was entitled to judgment for two hundred dollars.

3. PRACTICE: motion for judgment: evidence.

The judgment of the district court is reversed, and the cause is remanded, with directions to that court to render judgment in favor of the defendant for the amount stated, with interest thereon at six per cent. per annum from the date of its former judgment. REVERSED.

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JOHN. BERKSHIRE, Appellant, v. O. F. PETERSON, Appellant.

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**Deed**: DELIVERY: CANCELLATION: FRAUD. The plaintiff, being the owner of a house and lot worth one thousand dollars, and occupied by him as a homestead, entered into a written agreement with the

defendant to trade the same for eighty acres of land, which the defendant said he had not seen, but represented that it was worth twenty-five hundred dollars, and adapted to farming and suitable for a home. Under the agreement the plaintiff was to see the land before closing the deal, and if the trade was made he was to assume an incumbrance of one thousand and fifty dollars against the land. Subsequently the parties went to the office of the defendant's lawyers, executed deeds to their respective properties, the written agreement was destroyed, the recording fees for the two deeds were paid to the attorney, and thereupon the plaintiff left the office to go to see the defendant's land. The evidence of the respective parties as to whether a delivery of the deeds was assented to at this time was conflicting, but the attorney understood that the deeds were to be recorded, and sent them to the proper office for that purpose. The evidence showed that the plaintiff was inexperienced in business, ignorant and confiding, while the defendant was capable and awake to his own interest. The land being found worth not over five hundred dollars, the defendant asks that his deed be canceled. *Held*, that the evidence did not show that the plaintiff had assented to a delivery of his deed, and as the defendant would gain an unconscionable advantage over the plaintiff by the trade if enforced, the latter was entitled to the relief asked.

*Appeal from Polk District Court.*—HON. JOSIAH GIVEN, Judge.

TUESDAY, JUNE 2, 1891.

ACTION in chancery to rescind a deed on the ground that its execution was secured through fraudulent and false representations as to the value of land traded to the plaintiff by defendant for the lot conveyed in the deed. There was a decree dismissing the plaintiff's petition. He now appeals to this court. *Reversed.*

*Ira W. Anderson*, for appellant.

*Macy & Sweeney* and *John A. Call*, for appellee.

BECK, C. J.—I. The defendant owned an unincumbered house and lot in Des Moines, occupied by him and his family, and worth one thousand dollars, as

a home. The defendant owned an eighty-acre tract of land in Jasper county, upon which was a mortgage for one thousand and fifty dollars. The defendant represented that his land was worth twenty-five hundred dollars, and adapted to farming and the uses of a home. He stated that he had not seen the land, and that he had paid twenty-five hundred dollars for it in trade. The plaintiff was desirous of obtaining a home in the country, and finally bargained with the defendant to give his Des Moines house and lot for the land, and assume the payment of the incumbrance of one thousand and fifty dollars. A written contract to this effect was prepared and signed by the parties. The understanding between the parties was that the plaintiff, before executing the deed and closing the transaction, should have an abstract of title, and should see and inspect the land. The evidence shows that the plaintiff, who was a plasterer, had entered into a contract for work, and was anxious not to lose time from his employment, and for this reason proposed that the matter should be closed up without delay. He, therefore, proposed that the deeds be executed, and that he would go that very day to see the land. He waived inspection of the abstract, accepting defendant's statements as to its effect. They went to the office of the defendant's lawyers, had deeds prepared and executed, surrendered the written contract, which was destroyed,—each party paying fees to the lawyer for recording. Thereupon the plaintiff left the office, and went to see the land, which was about twenty-five miles from Des Moines. This was what was done. The lawyer understood that the deeds were to be recorded and sent them to the proper office for that purpose. The plaintiff testifies that he did not direct the recording of the deeds, nor did he assent to the delivery of the deed, so as to make it effective, but that he understood the transaction to be that the trade should not be

completed until he saw the land and found it to be of the character represented. He is positive in the statement that he did not assent to the passing of the title, and that he understood that should not be done until he had seen and approved the land. He is contradicted by the defendant. The lawyer, while not stating that plaintiff assented to the delivery of the deed so as to make it effective, understood that was the purpose of the parties.

We reach the very satisfactory conclusion that the plaintiff did not assent to the delivery of the deed in the technical sense, which made it effective as a conveyance, that he did not intend the title should pass until he had examined the land and approved it as corresponding with the defendant's representations. The plaintiff clearly appears to be inexperienced in business; ignorant, if not dull; and, as honest men of that class always are, confiding, and the ready victim for a sharper. The defendant appears capable and awake to his own interest. The conclusion we have stated as to the plaintiff's understanding of the contract is supported by admissions made by the defendant after the plaintiff returned from the land, to the effect that the trade had not been consummated, had fallen through, because the plaintiff did not approve the land, and that it was made subject to this condition. The defendant admits these statements, but accounts for them by declaring that he was requested by the plaintiff to make them, in order to cheat an agent who had a contract for commission for making the trade. His denial and explanation surely tend to impair his credibility. The plaintiff's story is in the manner of a plain, confiding, dull and honest man. We accept it as entitled to more credit than the unnatural and unreasonable evidence of the defendant.

II. The plaintiff, upon visiting and inspecting the land, found that one end of it was a worthless sand-

bank, the other a swamp, with about twenty acres in the middle fit for cultivation, and the whole tract was worth four or five hundred dollars. We are clear in the opinion that the plaintiff did not assent to the title passing by the delivery of the deed, so as to have that effect, until he had seen and was satisfied with the land. He did examine the land, and rejected it. The conveyance of his home is, therefore, invalid, and must be rescinded.

That the defendant represented the land as being worth twenty-five hundred dollars, when in fact it was not of the value of five hundred dollars, and that he knew it was not of the value he represented, we think is clearly established. The case is one where the superior mind of the sharp trader gains an unconscionable advantage over a dull and confiding man. The plaintiff, if the deeds be sustained, would lose his home, worth a thousand dollars, become indebted on a mortgage to the extent of one thousand and fifty dollars, and receive a tract of land worth five hundred dollars, which is useless for a home, the purpose for which he bought it. He becomes homeless and indebted five hundred and fifty dollars after applying the proceeds of the lands, if it will realize five hundred dollars, to the payment of the mortgage. In this court of conscience, clear evidence establishing valid contracts must be introduced which will permit of no escape from their enforcement to justify the expectation of upholding them, when they work such grossly inequitable results. Whoever consents to stand upon such a contract must be content to accept just what the strict letter of the law and justice will give him. He may have his pound of flesh, but not a drop of blood.

The decision of the district court is reversed, and the cause is remanded for a decree in harmony with this opinion, or, at the plaintiff's opinion, such a decree may be entered here. REVERSED.

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# J. C. MURRAY, Appellee, v. M. M. WALKER, Appellant.

1. **Partnership:** UNINCORPORATED ASSOCIATION: INDEBTEDNESS: LIABILITY OF MEMBERS: INSTRUCTIONS TO JURY. In an action against the defendant, as a member of an unincorporated fair association, for the amount of certain premiums offered by the association, it appeared that there was no express agreement between those charged as being officers and directors as to the organization or conduct of the association, and the defendant denied that he was an officer or member of said association, but he admitted that he was at the fair, acted as one of the judges at the races, and undertook the collection of money to pay certain bills, but not as a member of the association. The evidence showed, however, that the fair was largely advertised in the daily papers of the city where defendant resided, and gave the defendant's name as vice-president of the association, and that one of such papers was taken by the defendant. *Held*, that in view of the conflict in the evidence it was properly left to the jury to determine whether the defendant ratified the publication of his name as an officer of the association.

2. ———: ———: ———: ———. The court instructed the jury that if defendant had knowledge of the offer of premiums, and he, as a member of the association, assisted in holding the fair, this would amount to a ratification of such offer, and would render the defendant liable; but that his acts at the fair, if any, as a mere employe would not of themselves, if he was not a member, impose any liability upon him. *Held*, that the instruction was proper.

3. ———: ———: ———: ———. A rule of the association permitted the officers, in case of unfavorable weather, to reduce or scale down the premiums, and the court had instructed the jury that if the conditions were such that the officers might scale down the premiums the association would only be liable for the reduced amount. There was evidence of an offer on the part of the association to pay less than the full amount of the premiums, and of the acceptance by some of such offer. *Held*, that the court properly instructed the jury that no agreement of the exhibitors to accept a less sum than what was due, without other consideration than the payment of such less sum, would not be binding.

4. ———: ———: ———: ———. Where the court has instructed the jury upon a question in issue in a cause in a general way, but not as fully as desired by one of the parties, and such party does not ask a modification or change of such instruction, he cannot complain of such instruction upon appeal, although the court refused at the request of such party to give other instructions upon the same point.

5. ———: ———: ———: EVIDENCE. An irresponsive answer by a witness may be stricken out on motion of the party by whom the witness was called.

6. ———: ———: ———: ———. Where it is sought to subject one of the officers of an unincorporated association to liability for the indebtedness of such association, *held*, that it might be shown in proof of such person being an officer of the association that others who were advertised as officers of said association, as was the defendant, acted in such official capacity in fact.

7. ———: ———: ———: ASSIGNMENT. Where the signature to an assignment of an account by a partnership was disputed, *held*, that one who had corresponded with the firm, and knew its signature only as it had been communicated to him in that way, might testify that the signature to such correspondence was the same as that affixed to the assignment.

*Appeal from Jackson District Court.*—HON. C. M. WATERMAN, Judge.

TUESDAY, JUNE 2, 1891.

ACTION to recover premiums offered by the "Upper Mississippi Valley Inter-state Fair." The defendants in the suit as originally instituted are twenty-eight in number, being the president, vice-president, treasurer, secretary and directors of the fair. The petition represents that the defendants, as partners, associated together for the purpose of conducting a fair or exposition at Dubuque in September, 1884, and advertised for exhibitors of horses, cattle and other live stock, and articles of machinery, etc., to be present and compete for premiums offered by the association; that in pursuance thereof persons did appear and compete for said premiums; and that a large amount of the premiums thus competed for by various persons are due and unpaid, and that the plaintiff is now by assignment the owner thereof. The petition asks for judgment against each of the defendants. The answer presents defenses which will be noticed in the opinion so far as necessary. A separate trial was awarded the defendant Walker,

and the issues were submitted to a jury, that returned a verdict for the plaintiff, and from a judgment thereon the defendant appeals.—*Affirmed.*

*Fouke & Lyon* and *Robt. W. Stewart*, for appellant.

*L. A. Ellis*, *Graham & Cady* and *C. W. Farr*, for appellee.

GRANGER, J.—The case involves a consideration to some extent of the rules of law applicable to members of voluntary associations (unincorporated) for debts incurred. The defendant Walker was the alleged vice-president of the association. One E. R. Shankland was its secretary, and generally conducted the business of advertising and other preparations for the fair. The fair was prominently advertised in two of the leading daily papers of the city of Dubuque, and one of them was taken at the store of the defendant, and also at his residence, in which was a column of advertisement in large display type, with the names of the officers and directors of the fair, the defendant being designated as vice-president. The defendant's answer is a denial of his being a member or officer of the association, and his testimony is a denial of his having any business relation therewith. The assignments in the case bring in question the correctness of some of the instructions given and refused, and also rulings upon the admission of evidence. We may be somewhat aided in our consideration to have in view some unquestioned rules of law announced by the district court in the case, wherein the facts essential to a recovery are stated. The correctness of the fifth instruction given by the court is not questioned in argument, and stands, for the purposes of the case, as announcing correct rules, and we may add that they are justified by authority.

The instruction is as follows: "5. Parties to unincorporated associations are not holden to contracts

made in their names by others without authority. The authority, however, may be given in any of the ways known to the law of agency, or the act may become binding by ratification. Mere membership, or the fact, if shown, that the defendant performed some duties at said fair, would not create liability. But such facts may be considered with others as tending to show liability. In this case, if you find that defendant Walker was a member, and held an office, in said fair association, or if you find that he performed some duties at said exhibition, neither of these facts would create liability on his part to plaintiff, but it will be necessary for you to further find that he offered the premiums promised, or authorized some person to make said offer, or that he ratified the act of such other person in making such offer by adopting such act as his own after it was done. But in order to amount to a ratification it must be shown that defendant not only knew of the fact that the offer of said premiums was made by some third person, but it must further appear that said offer purported to be made in part on behalf of defendant as a member of said association, and that, knowing this fact also, he adopted and approved said act."

I. The fourth instruction, after stating some undisputed facts, as that there was a so-called "Upper Mississippi Inter-state Fair Association" in name; that a fair was held, premiums offered, etc., states some disputed questions, as: "Was defendant Walker a member of the association? Did he, as such member, take part in said fair, and offer, either by himself or agent, to pay the premiums offered, or, knowing of said offer, did he as a member of said association ratify the same?" The objection to the instruction is that it submits to the jury the question: "Was defendant Walker a member of said associa-

1. PARTNERSHIP: unincorporated association: indebtedness: liability of members: instructions to jury.

tion?" and it is urged that the correct query was: "Did defendant Walker ratify the act of Shankland in advertising him as an officer or holding him out as an officer of a pretended organization?" The question is to be settled by the issues on which the plaintiff seeks to recover. Looking to the petition, we find it alleged that the defendants "were partners, doing business * * * under the firm-name and style of Upper Mississippi Valley Inter-state Fair, and * * * held themselves out to the world as such." The liability of the defendant depended upon his being a partner in such association. If a partner, he was a member thereof. The pleadings put the alleged facts in issue, and the testimony was conflicting. Hence, the inquiry was not improper, but essentially necessary.

It is said in this connection that the "legal effect of the evidence offered is" that Walker did not so ratify the act of Shankland in advertising or holding him out as an officer, and that the appellant for that reason was entitled to a dismissal of the case. This involves an inquiry as to the legal effect of the evidence bearing on the question of the defendant's liability; that is, is it such that the court should, as a matter of law, have determined the defendant not liable? It may be said from the record that there was no express agreement between the defendants as to the organization or conduct of the association; that the understanding must have been mainly through interviews with Shankland in regard to the fair; the public nature of the enterprise, the publicity given thereto through advertisements, and the public announcement as to who were the promoters thereof. Mr. Walker does not say he did not see the advertisements in the papers of Dubuque including his name as vice-president of the fair, but he does say he does not recollect it; that he probably saw the advertisement, but gave it no attention; and has no recollection that he saw his

name as an officer. He states that he was present afterwards at the fair, and, at the instance of the superintendent of the department, acted as one of the judges at the races; that at the instance of Mr. Shankland he acted to collect some money to pay certain bills, but that nothing that he did was in consequence of his being a member of the association or connected therewith. We are then to inquire if there is anything in the record to so dispute this as to make the question of liability one of fact for the jury. It is a fact that from April to September the object and purpose of the fair were prominently in the public prints in the city of Dubuque, where the defendant resided, and was engaged in business; that it was a matter of general public interest; that such fairs, for success, demand the co-operation of many persons; that the business men of such a city would naturally be interested to know who were the promoters of an enterprise of so public a nature, as its success would largely depend thereon; that the management of such fairs is generally under the direction of officers of the classes named, and not by a single person, as would be the fact in this case under the claim of the appellant; that the defendant actually knew of the fair, and contributed twenty-five dollars thereto, and that his name, through the public advertisements, was before the public as an officer of the association. Viewing these facts without reference to the statements of the defendant, and we think no jury or person uninterested would long hesitate to say that the defendant both knew and tacitly at least assented to such use of his name. If so, such facts, viewed with the statements of the defendant, constitute a conflict that makes the question one of fact for the jury. The consideration of this point at this time will materially aid in the disposition of other questions to be considered.

II. The court's sixth instruction is as follows:

"6. If you find that defendant was a member of said
2. —: —: —: fair association, and had knowledge of
—. the fact that said association had offered the premiums in question, and he thereafter, as such member, assisted in the holding of said fair, this would amount to a ratification on the part of defendant, and would make him liable in this action. But his acts at said fair, if any, as a mere employe, if he was such, would not of themselves impose any liability upon him if he was not a member of such association."

It is said that "participation in holding the fair would not amount to ratification;" that he must have participated with full knowledge of the liability he was incurring thereby. The liability is the legal inference from the facts stated in the instruction. It is the law applicable to the facts, and that the defendant was bound to know. It is further urged that the instruction is faulty, misleading, in that it speaks of the acts of the defendant at the fair as an "employe." There is no evidence of his being an employe in the sense of "working for hire," but the term "employ" has a different meaning at times,—as, "to use," "to occupy," "to intrust;" and under the evidence there could not well have been any misunderstanding by the jury as to what was meant by the term "employe."

III. Complaint is made of the eighth instruction by the court, which is as follows: "8. If the whole
8. —: —: —: amount of the premiums offered was
—. earned by plaintiff or his assignors, and became due and owing from defendant, then no agreement, if any is shown, on the part of any of said exhibitors with the defendant or his assignors, to accept a less sum than what was so due, without other consideration for such agreement than the payment of such less sum, would be binding upon such exhibitor, and he or his assignors might, notwithstanding the acceptance of said sum, recover the balance still due."

There was a rule of the association that permitted the officers, in case of unfavorable weather, to reduce or "scale down" the premiums, and the court had instructed the jury that the obligation of the association for the payment of the premiums was in the nature of a contract; and, in effect, that the acceptance by the exhibitors must be in the light of all the terms of the offer; and that, if the conditions were such that the officers might scale down the premiums, the association would only be liable for the reduced amount. An objection to the instruction is that it assumes there was evidence tending to prove that some of the exhibitors agreed to take less than the full amount due. That there is evidence showing that there was an offer to pay less than the full premiums offered, and an acceptance by some, will not be questioned; the point of difference being that one party regards the amount due as the remainder of twenty-five per cent. after scaling down, and the other party the full amount offered. The court submitted to the jury the question whether the conditions existed to warrant scaling down the premiums, and it was in view of this situation on the trial that the court gave the eighth instruction to guard against the effect of any agreements to take a part of what was due in satisfaction of the whole, if it found the conditions such that the scaling was not justified; and the instruction, we think, properly expresses the law, and was warranted by the state of the evidence.

IV. There is a complaint that the court did not instruct the jury as to the legal effect of the rule permitting the scaling down of the premiums because of unfavorable weather, the thought being, as we understand, that the jury should have been told what kind of weather would be "unfavorable," so as to warrant scaling down. The

court instructed the jury briefly and in a general way on this branch of the case, and, to the extent of the instruction, correctly. The defendant asked other instructions, but did not ask a modification or change of the instruction in the particular as to which complaint is now made, and we think he should not now complain.

V. Numerous questions are presented as to the admission and rejection of evidence. Bart E. Linehan was a witness for the plaintiff, and stated on his direct examination that he "never accepted the trust of treasurer." The answer, on motion of the plaintiff, was stricken out as not responsive, and the appellant complains and says the ruling led the "jury to understand that he had accepted an office in an alleged association." But the plaintiff was entitled to a responsive answer to the question, and was not required to allow an irresponsive answer to remain, even if material (which we do not decide).

5. —: —: —: evidence.

VI. The court permitted witnesses to testify—as in the case of Mr. Linehan—that he acted as treasurer, and to what he did in that capacity as to payments of accounts, etc., and that one Crotty acted as clerk for him. It is urged that the acts of Mr. Linehan could in no way affect the defendant. Among the facts that the plaintiff must establish to recover is this: That these defendants were associated and acting together in the conduct of the fair. A way of doing this is by proving the acts of each in furtherance of the objects of the association, and the manner of their doing it; as, did the officers assume the duties that naturally belonged to the stations they were advertised as holding? If yes, was it publicly done, in view of the exhibitors, and in a way that others might reasonably understand they were really such officers? The testimony complained of was admissible for such a purpose.

6. —: —: —: —.

VII. S. S. Brown's Sons were exhibitors at the fair, and were awarded a premium of two hundred and sixty dollars, on which there is an unpaid balance of two hundred and ten dollars. which constitutes a part of the plaintiff's claim, as assignee thereof. S. S. Brown is dead, and his sons were engaged in business under the above name. Lucy Brown is executrix of the estate of S. S. Brown, and is at times spoken of in the testimony as "executrix of the estate of S. S. Brown's Sons," and also as a member of the firm. The firm's signature to the assignment was written by Lucy Brown, and its genuineness as that of the firm is questioned. Disregarding the evidence as to her being the executrix and a member of the firm, and the action of the court in admitting the signature or assignment in evidence is fully sustained. Mr. Farr testified that he had corresponded with the firm, and the signature in his correspondence is the same as that to the assignment; that he has transacted business for the firm, and knows the signature, as it has been communicated to him several times, and that the signature to the assignment "is the genuine signature for the copartnership of the firm, by which they do business with the world." It is true, he says he never saw the signature written, and that he knows it only through his business transactions and correspondence. The evidence clearly shows that Lucy Brown was authorized to attach the signature, and, further, that the firm recognized and acted upon the signature in its business relations. 1 Greenleaf on Evidence, sec. 577.

7. —: —: —: assignment.

It is not important that we consider the objections to the evidence further. The rulings are in the main correct, and in no case is there error to the prejudice of the defendant. The judgment is AFFIRMED.

# P. H. McCAULEY, Appellee, v. THE CITY OF DES MOINES, Appellant.

1. **Contract**: CONSTRUCTION: EVIDENCE. The plaintiff undertook by a contract in writing to construct a brick sewer for the defendant according to written plans and specifications at a certain price per lineal foot. By the terms of the contract he agreed to make all necessary excavations, and furnish at his own expense all necessary materials and labor. In making the excavation the plaintiff found it necessary to remove a large quantity of rock in order to put the sewer in place, which involved an expenditure of several hundred dollars more than would have been incurred if the excavation had been composed wholly of earth. *Held*, that parol evidence was inadmissible to show that when the contract was made the parties thereto supposed that the excavation would be of earth alone.

2. ———: ———. One of the specifications being that whatever precaution unforeseen circumstances may render necessary in the judgment of the engineer, in order to make the sewer both unyielding and impervious shall be taken; and that all extra work or materials rendered necessary thereby, which may be ordered by the engineer, should be paid for on his estimate; *held*, that the specification had no reference to the excavation.

*Appeal from Polk District Court.* — HON. MARCUS KAVANAGH, JR., Judge.

TUESDAY, JUNE 2, 1891.

THIS is an action to recover for alleged extra work in building a brick sewer under a written contract with the defendant. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Reversed.*

*Detrick & McMartin* and *Hugh Brennan*, for appellant.

*Kauffman & Guernsey* and *Macy, Sweeney & Jones*, for appellee.

Rothrock, J.—I. The contract which the plaintiff undertook to perform was to construct a brick sewer in the city of Des Moines, according to certain written plans and specifications. The plaintiff was to make the excavation, furnish the materials, and complete the work for four dollars and forty-four cents per lineal foot. He was to perform all the labor under the direction of the city engineer, and to furnish all the material necessary to construct and complete the work he undertook to perform. In making the excavation the plaintiff claims that it was necessary to remove a large quantity of rock in order to put the sewer in place, and that, when the contract was made, the parties thereto supposed that earth excavation would alone be required. The evidence shows that the excavation of the rock imposed upon the plaintiff an expenditure of several hundred dollars in addition to what would have been incurred if there had been an excavation wholly composed of earth. This is the foundation of the plaintiff's demand against the city.

1. Contract: construction: evidence.

The claim of the plaintiff must be determined by the contract, and we may here say at the outset that there is no ambiguity in the instrument that is susceptible of explanation by oral evidence. By the very terms of the contract the plaintiff bound himself "to furnish at his own proper expense all necessary material and labor, and excavate and build in a good, firm and substantial manner" the sewer in question. It was provided in the specifications that "the contractor shall make all necessary excavations for the sewer proper as well as for the appurtenances. The excavations are to be made in such directions and of such widths and depths as shall be necessary." If these provisions of the agreement of the parties are to be construed by the natural meaning of the language employed, there is no

ground upon which the plaintiff can be permitted to recover. He was bound to make the excavation without regard to the character of the substance to be removed, whether clay, sand, quicksand, hard-pan or stone. The fact that the excavation required labor which did not enter into the contemplation of the parties when the contract was made will not excuse a performance for the consideration agreed upon. The facts were equally within the knowledge or means of knowledge of each of the parties, and they must be held to its performance, and are not entitled to relief from hardships against which no relief can be predicated from the agreement. *Owens v. Butler Co.*, 40 Iowa, 190. That case was determined in 1875, and it is said therein that the principle above announced is elementary. It is to be found in every text-book upon contracts, and why the court permitted the plaintiff to introduce parol evidence to show that both parties supposed there was no rock formation in the line of the proposed sewer is more than we can understand. It was a plain and palpable violation of that other elementary principle that it is not competent to contradict the language of a written contract by parol evidence.

II. But it is claimed by counsel for the appellee that the contract did not absolutely provide that rock excavations should be made. The clause relied upon is found in the specifications, and is as follows: "Whatever precaution unforeseen circumstances may render necessary in the judgment of the engineer in order to make the sewer both unyielding and impervious shall be taken; and all extra work or materials rendered necessary thereby which may be ordered by the engineer shall be paid for on his estimate, and at a price to be determined by him. Any work not herein specified, which may be fairly implied as included in this contract, of which the city engineer shall judge, shall be done by the contractor without

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extra charge." The first paragraph of this part of the specifications has no reference to the excavation. It refers to that part of the work necessary to make the sewer "unyielding and impervious," and any extra labor or expense in the way of strengthening the sewer by additional courses of brick or otherwise, or by the use of additional cement or other appliance, to render the sewer impervious. It does not refer in the remotest degree to the excavation necessary to be made, and in which the sewer was to be placed. The last paragraph, in our opinion, has even less bearing upon the claim of the plaintiff than the first. It applies to any work not specified in the contract, and which is not fairly implied as included therein as extra work. But the excavation is plainly provided for in the contract. It is not necessary to imply anything to reach that conclusion. The contract is express upon this part of the work. There was no ground for any extra estimate to be made by the engineer for removing the rock, and all of his acts in that direction were without authority from the city council.

We need not discuss this case further. The court should have excluded the parol evidence, and, instead of instructing the jury as matter of law that the plaintiff was entitled to recover, the motion of the defendant to direct the jury to return a verdict for the defendant should have been sustained. REVERSED.

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## In the Matter of the Will of RALPH HEATH, Deceased; D. M. M. SINO, Appellant.

**Attorney and Client:** AUTHORITY TO WAIVE APPEAL. Where in a proceeding for the probate of a will, such instrument was, upon a trial to a jury, declared to be invalid because of the mental incapacity of the testator, and because of the execution thereof under undue influence, and the attorney for the proponent, pending a motion for a new trial, in the belief that said motion would not be sustained, and

that no relief could be obtained by an appeal to the supreme court, and after the proponent had told him that she could not raise the money necessary for an appeal, entered into an agreement with the attorneys for the contestants, whereby the motion for a new trial was to be withdrawn, all exceptions and the right of appeal were to be waived by the preponent, and her motion for the allowance of an attorney's fee and costs was to be sustained, *held*, that the agreement was one within the scope of the authority of the attorney to make, and the latter having acted in good faith the judgment entered in pursuance thereof would not be vacated upon the ground that said agreement was made without the consent of the proponent, and that her ignorance of the English language prevented her from properly watching the conduct of her case, and from understanding the suggestions of her attorney.

*Appeal from Scott District Court.*—HON. W. F. BRANNAN, Judge.

TUESDAY, JUNE 2, 1891.

THIS is a proceeding for the probate of an alleged will of Ralph Heath, deceased. The probate was proposed by the sole beneficiary and executrix therein named, Mrs. D. M. M. Sino, and was contested by certain heirs of the decedent. There was a trial by jury, and a verdict and judgment in favor of the contestants. The proponent appeals.—*Affirmed.*

*Sharon & Ryan* and *McEniry & McEniry*, for appellant.

*Heinz & Hirschl* and *Davison & Lane*, for appellees.

ROBINSON, J.—The instrument in question was contested on the ground that the decedent was mentally incompetent to make it, and on the further ground that it was executed in consequence of undue influence exerted upon the decedent by the proponent, and other persons confederated with her. On the trial in the district court George Hubbell acted as attorney for the proponent. After the verdict was returned, Hubbell

prepared and filed for his client a motion for a new trial. Before that motion was presented to the court for a ruling, he filed a motion for the allowance in favor of proponent of an attorney's fee of one hundred and fifty dollars and costs, to be made a charge upon the estate of the decedent. An agreement was thereupon made between Hubbell and the attorneys for the contestants, by which the motion for a new trial was to be withdrawn, exceptions and the right of appeal were to be waived by the proponent, and her motion for the allowance of an attorney's fee and costs was to be sustained. That arrangement was carried into effect, and judgment was rendered in favor of the proponent for the fees and costs named, and in favor of the contestants as to the validity of the will. No exceptions were taken by either party. The agreement specified was made and the judgments were rendered on the ninth day of October, 1889. On the twelfth day of the next month, and during the same term of court, the proponent filed in the district court an application to have the judgment set aside, and for a ruling on the motion for a new trial on the grounds stated, as follows:

"*First*, that proponent never consented to a withdrawal of her motion for a new trial; *second*, that said motion was withdrawn without her understanding the effect of the same, or consenting thereto; *third*, that she never consented to the entry of judgment on the verdict of the jury, on the payment of her costs and attorney's fees; *fourth*, that she never consented to any action that would bar her rights to prosecute in any court the proving of said will; *fifth*, that the grounds of the motion for a new trial were and are deemed good in law and justice by her; *sixth*, that proponent's ignorance of the English language has debarred her from properly watching and protecting her rights in conducting her cause, and understanding the suggestions of her

counsel, if such are made; *seventh*, that proponent has discovered material evidence that she can obtain on a retrial of said cause, and which was not offered and could not be obtained on a former trial."

The application was supported by affidavits and resisted by counter-affidavits, and was overruled.

It is contended by the appellant that Hubbell had no authority to withdraw her motion for a new trial, and waive her right of appeal. She made an affidavit in support of her application to have set aside the judgment, in which she states, in substance, that she does not understand the English language well, and that Hubbell used no other; that he at all times informed her that she had a meritorious case, and that the will was valid; that, after the verdict was returned, she talked with the partner of Hubbell, and was assured by him that an appeal to this court would be taken; that she afterwards saw Hubbell, who asked her if she had two hundred dollars with which to take an appeal; that she did not have the money, and was told by Hubbell that nothing could be done; that she was never consulted as to the advisability of dropping the case, nor about filing a motion for attorney's fees and costs; and never released her attorney from his duty to protect her rights. Other affidavits filed in support of the application relate to evidence alleged to be newly discovered, and to the probable result of another trial. It is sufficient to say of these that they show no diligence to obtain the evidence to which they refer, and we do not understand that anything is claimed for them in this court. In resistance of the application, the affidavits of Hubbell and of an attorney for contestants were filed. They show that Hubbell became satisfied that the motion for a new trial would not be sustained, and that no relief could be obtained by appealing to this court; that he had an interview with the proponent, in which he told her that no question

of law was involved in the case, and the questions of fact had been determined against her by the jury; that it seemed to him useless to prosecute the matter further, but that he would do so if she desired it; that it would probably cost her two hundred dollars to carry the case to this court, but she told him she could not raise the money; that after reflection he adopted the plan which was carried out as a proper thing to do; that it was agreed to by the attorney for contestants as a means of securing an early settlement of the estate of the decedent, and as being desirable for his client on that account, and to save the expenses of protracted litigation. An attorney has power "to bind his client to any agreement in respect to any proceeding within the scope of his proper duties and powers." Code, sec. 213, subd. 2. It is his duty to act with the utmost good faith to his client, but it is not his duty to prosecute a case he believes to be hopeless, when his client does not require it. A reading of the entire record impresses us with the belief that the agreement in question was made by the attorneys of the parties in the utmost good faith, and in the belief that the best interests of their respective clients would be promoted thereby. Mr. Hubbell believed that his client had been wronged by the verdict, but he also believed that the wrong could not be remedied. He was informed by his client that she could not furnish the money required for an appeal. He may have erred in thinking that the district court would overrule the motion for a new trial, but he appears to have acted in good faith, and with reasonable ground for believing that what he did was for the best interests of his client. We think he was authorized to so act. *Bray v. Doheny*, 39 Minn. 355; 40 N. W. Rep. 262; *Pike v. Emerson*, 5 N. H. 393; *Bonney v. Morrill*, 57 Me. 372; *McLeran v. McNamara*, 55 Cal. 508.

It is claimed that the rule contended for by the

appellant finds support in *Ohlquest v. Farwell*, 71 Iowa, 233. It was said in that case that "an attorney cannot consent to a judgment against his client, or waive any cause of action or defense in the case; neither can he settle or compromise it without special authority." But in this case the attorney did not consent to a judgment, and authority to effect the settlement he made may be fairly inferred from the conversation of the parties and the circumstances of the case. It is true the settlement was not specially authorized, but the situation and prospects of the case were explained to the proponent, and from what was said the attorney was justified in believing that an appeal could not be taken, and that it was his duty to secure the most favorable terms he could for his client. It will not do to hold that an attorney has no power not specifically conferred by statute or by the terms of his engagement. It frequently happens that it is proper, and for the interest of his client, to make concessions, admissions, and even agreements which may, when considered alone, seem to be against his client's interest. Whether he has exceeded his authority in so acting will depend upon all the facts of the case. He will not be permitted to barter the interests of his client for his own benefit, nor to act in collusion with the adverse party, but it is necessary for the due administration of justice that his power be somewhat liberally construed. In our opinion, there was no sufficient ground for the application of the proponent to vacate the judgment, and it was properly denied. AFFIRMED.

# A. R. HENDERSON, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

**Trespass**: VERDICT: EXCESSIVE DAMAGES. In an action to recover damages for an alleged trespass upon certain lands the jury found that the defendant had without authority taken possession of one-twelfth of an acre of the plaintiff's lands of the value of fifty dollars per acre, that no damage had been done to the land itself, and that the plaintiff was not entitled to recover anything for restoring the soil, but allowed the plaintiff the sum of fifty dollars as the rental value of the land occupied by the defendant for four and one-half years. *Held*, that the verdict was excessive.

*Appeal from Appanoose District Court.*—HON. H. C. TRAVERSE, Judge.

TUESDAY, JUNE 2, 1891.

THIS is an action to recover damages for an alleged trespass upon certain land, the property of the defendant. There was a trial by jury, resulting in a verdict and judgment for plaintiff. The defendant appeals. *Reversed.*

*Thos. S. Wright* and *Tannehill, Vermillion & Vermillion*, for appellant.

*G. D. Porter*, for appellee.

ROTHROCK, J.—This appeal involves a small amount of money, and, considering the amount in controversy alone, it is of very little significance. We are required, however, to give the question involved the same consideration that is accorded to cases of more consequence to the parties. The plaintiff is the owner of certain land in the vicinity of the city of Centerville. The defendant owns and operates a line of railroad running on or near the line of the plaintiff's land. The

plaintiff leased part of his land to a coal company, which company was engaged in mining coal. In 1875 or 1876 the defendant, without any express permission from the plaintiff, entered upon his land, and laid down a spur track to a bank of coal slack, for the purpose of removing the slack, which was deposited on the plaintiff's land with his consent. This track remained upon the plaintiff's land until some time in the spring of 1889, when the defendant removed it. This action was commenced on the twenty-seventh day of August, 1889. There is not much question, from the facts disclosed in evidence, but that the plaintiff is entitled to recover for the use and occupation of his land for the period of five years previous to the commencement of the action. This would embrace about four years and six months. A number of questions are discussed by counsel for the appellant, touching the right to maintain any action, because of the claimed assent of the plaintiff to the use of the land by the defendant. We think that the evidence did not demand a finding that the possession was by reason of a license by the plaintiff, and we think the court properly instructed the jury that the plaintiff was entitled to recover the fair rental value of the land for the five years next preceding the commencement of the suit. But the defendant claims that the verdict of the jury is excessive, and, as we think the claim is well founded, it is necessary that we should give that question some consideration; and to demonstrate the conclusion we reach, it is only necessary to set out the findings of the jury upon certain special interrogatories, and briefly consider certain evidence in explanation of these findings. The special interrogatories and answers thereto are as follows:

"*First.* How much of the plaintiff's land did defendant take possession of, if any? *A.* About one-twelfth of an acre.

"*Second.* When did the defendant take possession of said land? *A.* In 1875 or 1876.

"*Third.* How much damage, if any, do you allow for damage to the land that accrued more than five years next before the commencement of this suit? *A.* Not anything.

"*Fourth.* How much damage do you allow, if any, for rental value that accrued more than five years before the commencement of this suit? *A.* Not any.

"*Fifth.* How much damage do you allow, if any, for injury done to the land itself within five years next before the commencement of this suit? *A.* Not any.

"*Sixth.* How much do you allow, if any, for rental value of the land in question during the five years next before the commencement of this suit? *A.* Fifty dollars ($50).

"*Seventh.* How much do you find the value of said land now in question was per acre at the time defendant put down its track on it? *A.* We have no evidence in the case to go by.

"*Eighth.* What do you find the value of said land was last spring per acre? *A.* Fifty dollars ($50).

"*Ninth.* Do you allow anything for moving the dirt that came out of air shaft? If so, how much? *A.* Not anything.

"*Tenth.* Do you allow anything for restoring soil? If so, how much? *A.* Not anything.

"*Eleventh.* Did the plaintiff know that the track in question was being put in at or about the time it was put in? *A.* He did not until about the time the track was finished.

"*Twelfth.* Did he object to the track being laid on his land? If so, when? *A.* He did not.

The following is propounded by the court: "Did the defendant, through his servants, agents or employes, take possession of said strip of land without

the knowledge or consent of the plaintiff? *A.* Yes, they did."

A claim was made by the plaintiff that the land itself was injured by digging up the soil, and by depositing cinders thereon. There was a conflict in the evidence on these questions, and it will be observed that the jury in estimating the damages entirely excluded them from their consideration. The verdict of fifty dollars is founded exclusively on the rental value of one-twelfth of an acre of land, which is of the value of fifty dollars an acre, for a period of about four years and a half. There is no claim or pretense that any land of the plaintiff, other than the one-twelfth of an acre, was in any way affected or damaged by any act of the defendant. Upon the basis of the finding of the jury, if the defendant had occupied one acre, the rental value for the same time would have been twelve times the amount of the verdict, and the plaintiff would have recovered six hundred dollars for the use of an acre of his land for four years and a half. It is scarcely necessary to say that there is no competent evidence in the case which authorizes any such a verdict as the jury found. There is no evidence that the land had any peculiar adaption to any special use. It is true it is near the city of Centerville, and no doubt is worth fifty dollars per acre, as the jury found; but that is no reason why its rental value should be placed at the rate of more than one hundred and fifty dollars an acre.

The judgment of the district court is REVERSED.

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T. H. GORDON, Appellee, v. O. A. ANDERSON *et al.*, Appellants.

**Negotiable Paper:** CERTAINTY OF PAYEE. A promissory note payable to a person named therein, "*et al.* or order," is not negotiable either at common law, or under section 2085 of the Code.

*Appeal from Lee District Court.*—HON. J. M. CASEY, Judge.

TUESDAY, JUNE 2, 1891.

THE plaintiff, as assignee for value and before maturity of two promissory notes executed by defendants, payable "to Charles R. Whitesell *et al.* or order," asks judgment thereon, and the foreclosure of a mortgage given by the defendants to secure the same. The defendants answered that the notes and mortgage were executed for part of the purchase price of certain real estate sold to them by Charles R., Emily, J. L. and Phebe J. Whitesell, and for which Charles R., J. L. and Phebe J. executed to the defendants a warranty deed warranting the title to said property. The answer alleges a breach of the covenants of warranty, and damages in the sum of five hundred dollars, which the defendants ask as an offset against the notes. The plaintiff demurred to the answer on the ground that the damages set up were claims against the payee of the notes, and no defense against the notes, in his hands, he being a purchaser before maturity, and without notice; and that the answer sets up no defense to said notes, as against the plaintiff, he being an innocent holder for value before maturity. The demurrer was sustained, and the defendants electing to stand upon their answer, and refusing to plead over, a decree was entered for the plaintiff, from which the defendants appeal.—*Reversed.*

*H. Scott* and *Howell & Son*, for appellants.

*Craig, McCrary & Craig*, for appellee.

GIVEN, J.—I. The discussion is addressed entirely to the question whether the promissory notes sued

upon are negotiable. It will be observed that they are promises "to pay to Charles R. Whitesell *et al.* or order." The discussion is as to the construction to be given to the words "*et al.*," and the effect thereof. The words as here used evidently mean "and others." Therefore, the notes are payable to Charles R. Whitesell and others or order, without designating whom the others are. To learn what qualities are essential to a negotiable promissory note, says Mr. Parsons in his work on notes and bills, page 30, "we must bear in mind the purpose of the note, and of the law in relation to it. This is simply that the note may represent money, and do all the work of money in business transactions. For this purpose the first requisite—that thing which includes all the rest—is certainty." Certainty, says the author, as to the person who shall receive the money, the person or persons who are to make the payment; the amount to be paid, and the time when payment is to be made. In Story on Promissory Notes, section 35, it is said: "In instruments designed for circulation, it is of the highest importance to know to whom its obligations apply, and from whom a title can securely be derived." In *Smith v. Marland*, 59 Iowa, 645, 649, it is said: "The qualities essential to a negotiable promissory note are that it shall possess certainty as to the payor, the payee, the amount, the time of payment and the place of payment." Such is the rule uniformly laid down in all the authorities, and it does not require further citations. This case must not be confounded with notes payable in the alternative, as "to A or B;" it is a promise to pay to Charles R. Whitesell and others jointly. Neither must it be confounded with notes payable to bearer, without naming any payee, nor with the cases in which it has been held that whoever legally owns such a note may recover thereon. These notes being promises to pay Charles R. Whitesell and others jointly, Whitesell could not

alone transfer them so as to convey the interest of the other payees any more than if they had been named in the notes. A note made to several persons not partners can only be transferred by the joint action of all of them (*Ryhiner v. Feickert*, 92 Ill. 305); "and neither payee can, of course, indorse the names of the others without special authority." Randolph on Commercial Paper, sec. 155.

The appellee contends that these notes are in accord with the provision of section 2085 of the Code. Turning to section 2082, we see that notes in writing, signed by the person promising "to pay to another person or his order or bearer, or to bearer only, any sum of money, are negotiable by indorsement or delivery." It will be observed that the promise must be to another person or his order or bearer, and does not dispense with the certainty of which we have been speaking as to whom that other person is. Section 2085 is as follows: "Instruments by which the maker promises to pay a sum of money in property or labor, or to pay or deliver property or labor, or acknowledges property or labor or money to be due to another, are negotiable instruments, with all the incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker; but the use of the technical words 'order' or bearer' alone will not manifest such intent." Here, again, the promise must be to another, and there is nothing in the section to modify the rule requiring certainty as to whom that other is. It is true, as contended, that negotiable instruments may be transferred by indorsement or delivery; but that does not aid us in determining whether these particular instruments are negotiable. It is said that Charles R. Whitesell is the only payee named. That is true, but the notes show that he is not the only person to whom payment is to be made. If it be true, as alleged in the answer, that the other persons named,

together with Charles R., are in fact payees of the notes, then, surely, Charles R. is not the only payee, and could not alone transfer them. Authorities are cited in support of the claim that, if any words are used which indicate that the maker intended that the notes should be negotiable, the law will give effect to that intention, as against him. It is a sufficient answer to say that, in view of the law which requires certainty in negotiable instruments as to whom the payee is, the fact that it is left uncertain rather indicates an intention that the instruments should not be negotiable.

The appellee relies upon *Moore v. Anderson*, 8 Ind. 18. That note was payable to steamboat Juda and owners, and the court held that the word "owners," as it occurred in the note, sufficiently indicated a person, within the intent of the law. It is a familiar rule that, when a person is designated as payee, and a question arises as to who of several persons bearing the same designation was meant, evidence is admissible to show which is the payee. Parsons on Mercantile Law, 88. Under this rule it was admissible to show who was the owner of the steamboat, and, hence, the designation was sufficient. In *Grant v. Vaughan*, 3 Burrows, 1516, it is held that a note payable "to ship Fortune or bearer is negotiable, under the rule that, if the name of payee be not the name of a person, as if it be the name of a ship, the instrument is payable to bearer." See, also, Parsons on Mercantile Law, 89. In each of these cases a person was designated as payee,—in the one as the owner of the steamboat Juda; and in the other as bearer. These notes are payable to Charles R. Whitesell and others or order. The others are not designated by name or otherwise, and, therefore, it is uncertain "as to the persons who shall receive the money," uncertain "to whom its obligations apply, and from whom a title can securely be derived."

We think the district court erred in sustaining the demurrer to the answer. REVERSED.

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# WILLIAM KELLEY *et al.*, Appellants, v. ANDREW COSGROVE, Appellee.

1. **Contracts Made on Sunday**; RESCISSION. A party is not entitled to the rescission of a contract of exchange of personal property upon the ground that it was made on Sunday, where it appears that no advantage has been taken by either party, and neither has suffered loss by the transaction.

2. **Practice**: CHANGE OF VENUE. The right to a change of venue upon the ground that the action has been brought in the wrong county cannot be determined upon an issue joined under allegations contained in the defendant's answer.

*Appeal from Hancock District Court.*—HON. G. W. RUDDICK, Judge.

TUESDAY, JUNE 2, 1891.

ACTION of replevin for a horse. The petition shows that the plaintiffs were the owners of the horse in question, and that on Sunday, the eleventh day of August, 1889, they traded or exchanged said horse with the defendant for a certain mare, the exchange of possession being made on that day; that on the next day Thomas Kelley, as the agent of the plaintiffs, tendered back the mare, and demanded a return of the horse, for the reason that the exchange or trade was made on Sunday, and was therefore void, which the defendant refused; and that the exchange of horses was not a work of charity or necessity. The answer of the defendant admits that he went to the defendant's place of business on Sunday, and then and there made the exchange of horses referred to in the plaintiffs' petition, and that said exchange was complete in every respect and particular, the plaintiffs taking the mare referred to in the petition, and the defendant taking the horse therein referred to; that said exchange was completed in all respects on the day and date above

mentioned. The defendant also admits "that the said trade and transaction was not an act or work of charity or necessity," and that a re-exchange of horses was demanded and refused. Upon this state of the proceedings as to the issue presented the plaintiffs moved the court for judgment in their favor for the possession of the horse and for costs on the ground that the exchange of horses was a Sunday contract, and the plaintiffs had tendered back the mare, and demanded a return of the horse, which was refused. The court overruled the motion and the plaintiffs elected to stand thereon. The court then proceeded to try an issue involving the proper venue of the cause, and upon the hearing transferred the cause to Kossuth county, and allowed the defendant twenty-five dollars because of the suit having been brought in the wrong county. The plaintiffs appeal.—*Reversed in part, and in part affirmed.*

*W. E. Bradford*, for appellants.

*W. B. Quarton* and *R. J. W. Bloom*, for appellee.

GRANGER, J.—I. These parties met and exchanged horses on Sunday. The transaction was unlawful. The record does not disclose that either party suffered a loss in the transaction. It was an exchange of a horse for a horse, and there is no averment or claim that they are not of equal value. The parties were alike in the wrong, and the law makes the same presumption for and against each. If this exchange had been made on a secular day, there could be no pretense of the plaintiffs' right of recovery. The question is, therefore, one of a naked legal right, not to relief from the consequences of a violated law, but to invoke the aid of a violated law to relieve them from what would otherwise be legal. It is well settled that the law will not aid the parties to enforce a contract made on Sunday. Thus if A sells

1. CONTRACTS made on Sunday: rescission.

his horse to B on Sunday on credit the law will not aid him to enforce a payment. It will sooner permit him to suffer the loss. Much less will it, if he sells his horse on Sunday, and receives in money the full value thereof, assist him on Monday to return the money and regain his horse. This supposed case as against the appellants is not stronger than the one at bar. It is not important that we should discuss cases in which one party has a superior advantage, and is seeking to take the property of another without compensation, or to make rich gains by means of the Sunday law. Without now committing ourselves to any theory in such cases, it is easy to imagine conditions and wrongs for which it would be difficult to believe the legislature ever designed the law as a shield. But it is not difficult to believe that the legislature never intended that the law against Sabbath-breaking should be a means of enabling parties, because its offenders, to escape that which but for the offense would be legal and just.

The appellants have made an extended collection of authorities bearing on the enforcement and application of Sunday laws to different facts, but no case is brought to our attention that, in its facts, is like this. The appellants criticise the holding in *Gunderson v. Richardson*, 56 Iowa, 56, and intimate that it should be overruled if it militates against their position in this case. It was held, in that case, that there could be no recovery for fraudulent representations made as an inducement to enter into a contract on Sunday. It is true that the holding and reasoning in that case is inconsistent with the appellants' position in this; but it does not follow that an adverse holding in that case would support the appellants' view in this. In that case the defendant pleaded the violation of the Sunday law as a defense or shield against a charge of fraud, and this court sustained the plea, upon the authority of

*Pike v. King*, 16 Iowa, 49, and *Kinney v. McDermot*, 55 Iowa, 674; citing, also, *Smith v. Bean*, 15 N. H. 577. The abstract contains a parenthetical statement that the petition originally contained allegations of warranty and false representations, "which allegations were stricken and withdrawn by the plaintiff," showing an intent to divest the record of such a claim. This case rests, then, upon this proposition: If a party, in violation of the law, parts with his property on Sunday, will the law for that reason alone aid him to regain it? Without hesitation, we answer, "No." The late case of *Foster v. Wooten*, 7 S. Rep. (Miss) 501, while it sustains our answer to the query, is of much broader significance; and we cite it only to the extent of its bearing on the question before us. It is there said: "Grant, then, that the sale was made on Sunday; what is the rule of law on such state of facts? Nothing more than absolute non-action. It will give neither party to the contract any assistance, nor listen to any complaint. It will leave the parties where it finds them. That is the extent of the rule. It cannot be reasonably asserted that the seller of the stock, L. D. Lewis, could have made any maintainable appeal to any court for the annulment of the trade and the recovery of the stock. Equally in fault with the buyer, A. F. Foster, the law would decline to afford him any countenance, leaving him just where it found him, and where his own act had placed him. With what show of reason can it be contended that the attaching creditor of L. D. Lewis could take any step for the assertion of any claim to the stock thus wrongfully sold on Sunday, which L. D. Lewis himself could not take? But this whole question has been too long and too firmly settled to be now disturbed. Neither L. D. Lewis nor the attaching creditor could dispossess the Sunday purchaser, or any purchaser under him. See *Block v. McMurray*, 56 Miss. 217, and cases there cited."

II. The defendant filed a motion to change the place of trial to Kossuth county, on the ground that it was the county of his residence, which was overruled, and permission was given to him to answer in sixty days, and the cause continued. Before answering, the defendant moved again to change the place of trial to Kossuth county, and supported the motion by affidavits that at the commencement of the action the horse in question was in Kossuth county, which motion was overruled. The defendant, in his answer, made allegations to the effect that at the commencement of this action he resided in Kossuth county, and that the horse in question was also in that county. The plaintiffs moved the court to strike such allegations of the answer, which the court refused; and, after ruling on the plaintiffs' motion for judgment on the pleadings, the court, a the request of the defendant and against the objections of the plaintiffs, proceeded to investigate the facts as to the residence of the defendant and the location of the horse at the commencement of the action, and found them with the defendant, and by order changed the place of trial to Kossuth county, and allowed the defendant twenty-five dollars, as attorney's fees, for removing the cause to the proper county; and of this the appellant complains.

2. PRACTICE: change of venue.

It will be observed that the trial of the two motions involved the same issue of fact presented by the answer as to the venue of the action, and upon the motions the proper place of trial was determined to be in Hancock county. We are unable to understand on what theory the same question should be again adjudicated upon averments in the answer. Code, section 2589, provides that, "if suit be brought in a wrong county, it may there be prosecuted to a termination, unless the defendant, before answer, demand a change of place of trial to the proper county." The letter of the statute

requires the demand for a change to be made before answer. The appellee's position is that by the motions the demand was made before answer; but that it need not be "disposed of before answer." The demand by motion was disposed of before answer, and that demand was no longer a subject of inquiry in the case; and the investigation, after answer, was not on the motions, but on the averments of the answer. The appellee says, in argument, that the rulings on the motion were right because of an allegation in the petition, "that the defendant wrongfully detains possession of said gelding from plaintiffs, at and in said Hancock county, Iowa," and that the allegations of the petition could not be controverted by affidavits, and, hence, that the question could properly be presented by averments in the answer. The only possible significance of the allegation in the petition was as to the right to bring the suit in Hancock county. It was an unnecessary averment to the plaintiffs' right of recovery. Code, section 3225, prescribes the necessary averments in an action to recover specific personal property, and one is not required to aver the place where the property is detained. It is unnecessary to allege a place, except when it forms a part of the substance of the issue. Code, sec. 2703. In *Jordan v. Kavanaugh*, 63 Iowa, 152, it is held that facts that relate only to the right to bring a suit in a particular county, are not material to a right of recovery; and where pleaded the defendant is not bound by them, but may, on a motion to change the place of trial, show by evidence that the suit is brought in the wrong county. The defendant, then, on his motions had the right, notwithstanding the averments in the petition, to prove the facts entitling him to a change of the place of trial. But, further, the abstract affirmatively shows that on the trial of the second motion the proofs, in its support and in resistance, were directed to the particular question of the

place where the horse was at the commencement of the action. No objection appears to have been made by the plaintiffs to a full investigation on the motion, and the ruling thereon is, to our minds, conclusive of the question, and the motion to strike from the answer should have been sustained. The appeal in the case is from the two orders, and not from a final judgment.

On the appeal from the order changing the venue of the case the action of the court is REVERSED.

On that overruling the motion for judgment, it is AFFIRMED.

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## Varnecie McClain, Appellant, v. The Incorporated Town of Garden Grove, Appellee.

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**Personal Injury:** DEFECTIVE BRIDGE: PROXIMATE CAUSE. While the plaintiff was riding in a sleigh across a bridge, maintained by the defendant, her horse suddenly fell dead against the railing at the side of the bridge, which gave away, and caused the horse to fall over the side to the ground below, carrying the sleigh and the plaintiff with him. The bridge was but twelve feet wide, and the railings were two and one-half feet high. The evidence showed that the horse fell either from disease or because he was improperly harnessed and driven. *Held*, that conceding that if the railing of the bridge had been of sufficient height and strength to bear the weight of the horse the accident would not have happened, the condition of the railing and the narrowness of the bridge were not the proximate cause of the plaintiff's injuries.

*Appeal from Decatur District Court.*—Hon. R. C. Henry, Judge.

Tuesday, June 2, 1891.

This is an action to recover for personal injuries alleged to have been caused by the wrong of the defendant. There was a judgment in favor of the defendant. The plaintiff appeals.—*Affirmed.*

*E. W. Curry* and *S. A. Gates*, for appellant.

*S. H. Amos* and *R. L. Parrish*, for appellee.

ROBINSON, J.—In January, 1888, the defendant controlled and was responsible for the condition of a certain bridge over a railway within its territorial limits. The bridge was twelve feet wide, provided with side railings, and reached by means of steep approaches. In the month named one Ira Miller invited the plaintiff and another lady to take a sleigh ride for pleasure. The invitation was accepted, and the party started in a cutter drawn by one horse. In the course of the ride they attempted to cross the bridge described. The horse drew the cutter with its load up the steep approach, and onto the bridge. When a part of the way over the horse suddenly fell against the railing on one side of the bridge, broke it down, and dropped off, drawing with him the cutter and its lady occupants. The plaintiff fell to the ground below, and received the injuries for which she seeks to recover in this action. She claims that the defendant was negligent in maintaining a bridge of insufficient width, in not providing it with sufficient railings, and in permitting it to be used without sufficient railings. The defendant avers that the accident occurred without fault on its part, in consequence of the carelessness of the plaintiff and the negligence of Miller, and insists that the alleged defects in the bridge were not the proximate cause of the injuries received by the plaintiff. After the evidence had been submitted on the part of both parties the court sustained a motion of the defendant to direct the jury to return a verdict in its favor. A verdict was returned in favor of the defendant by direction of the court, and judgment was rendered thereon.

The first ground alleged in the motion for a verdict was that the evidence showed that the defects alleged in the bridge were not the proximate cause of the injury.

It appears without contradiction that there was snow about half way up the approach to the bridge, and none on the bridge. The horse pulled steadily and without apparent difficulty in going onto the bridge, fell without warning of any kind, and appears to have been dead when he fell. Miller, who owned the horse, is of the opinion that its death was caused by heart disease, although it may have been choked by the breast harness in which it was pulling at the time. To entitle the plaintiff to recover it must be shown that the injuries of which she complains were the natural and proximate result of the alleged defects in the bridge. *West v. Ward*, 77 Iowa, 323, and cases therein cited. Under the evidence submitted we do not think that it is a matter about which there can be any controversy. The horse which Miller was driving fell because it was diseased, or not properly harnessed and driven. The width of the bridge and the condition of the railing had nothing to do with its fall and death. Had it not fallen the accident would not have occurred. The railing of the bridge was about two and one-half feet high, and it may be true that, had it been of sufficient height and strength to bear the weight of the horse, the accident would have been avoided. But the defendant was not an insurer against accidents. 2 Dillon on Municipal Corporations, sec. 789; *Raymond v. City of Lowell*, 6 Cush. 524. It was its duty to provide for the use of the bridge in the usual manner, and to guard against ordinary contingencies, or those which might be reasonably apprehended. It was its duty to provide railings of sufficient height and strength to prevent horses and other animals from walking off at the side, and to resist any weight and pressure which would be applied under ordinary circumstances; but it was not its duty to provide a railing which would successfully resist the weight of a horse of ordinary size precipitated suddenly against it.

It is said that if the bridge had been wider the horse might have been turned when it was discovered that there was no snow on the bridge, but there is no evidence to justify the claim that the horse would have been turned under any circumstances. On the contrary it is shown that Miller knew the bridge was bare before he drove onto it. We conclude that the condition of the railing and the narrowness of the bridge were not the proximate cause of the injuries sustained by the plaintiff. See *De Camp v. Sioux City*, 74 Iowa, 392; *Handelun v. Burlington, C. R. & N. Ry. Co.*, 72 Iowa, 710; *Knapp v. Sioux City & P. Ry. Co.*, 65 Iowa, 91, 93. The case of *Houfe v. Town of Fulton*, 29 Wis. 297, is relied upon as sustaining the claim of the appellant. The facts involved in that case were somewhat similar to those under consideration, but it appears that the bridge was without a railing, and that the injury might not have occurred had there been a suitable one. The essentials of such a railing were not considered, and much of what was said in that case is in harmony with conclusions we have announced.

We find it unnecessary to determine some of the questions discussed by counsel for the appellant, since the one determined is controlling. In our opinion the evidence shows without conflict that defendant is not liable for the injuries sustained by the plaintiff, and the case was properly taken from the jury. AFFIRMED.

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## A. B. SMITH, Appellee, v. H. K. HESS, Appellant.

1. **Agency**: COMMISSION FOR SALE OF REAL ESTATE: CUSTOM: INSTRUCTIONS TO JURY. Where in an action by a broker for commission for the sale of real estate, mortgaged for nearly its full value, which mortgage the purchaser assumed, and conveyed to the grantor other real estate for the equity in the premises, the evidence was uniform as to the customary charges of agents for the sale of real estate, but was conflicting as to what sum should be the basis upon which to compute the commission, *held*, that under the circumstances the court

properly instructed the jury that if they found a custom existed as to charges for such services it must be shown that the principal had knowledge of its existence.

2. **Lease**: CONSTRUCTION: EVIDENCE. Where a lease for a hotel provided that the lessee should make all improvements he might deem necessary in the house at his own expense, but that all outside and permanent improvements were to be done at the expense of the lessor, and the cost thereof deducted from the rent, *held*, that the lessee was not entitled under such provision to reimburse himself for the cost of placing a heating furnace in the house, and that evidence of verbal agreement of the lessor to allow the lessee for the cost of the same was inadmissible.

3. **Costs**: COUNTERCLAIM: APPORTIONMENT. The defendant admitted the plaintiff's claim, and the amount of the latter's recovery was reduced somewhat by the defendant's counterclaim, but nearly the whole cost of the trial resulted from one counterclaim of the defendant in which he was unsuccessful. *Held*, that facts did not warrant an apportionment of the costs.

*Appeal from Polk District Court.*—HON. CHARLES A. BISHOP, Judge.

TUESDAY, JUNE 2, 1892.

PLAINTIFF was the owner of a hotel in the city of Des Moines known as the "Given House." He leased the property to the defendant by a written lease, and this action is brought to recover the rent agreed upon between the parties. The defendant by his answer admitted that the plaintiff's claim was correct, and pleaded some four counterclaims, upon which he demanded judgment against the plaintiff. The cause was tried to a jury, and there was a verdict and judgment for the plaintiff for the amount of his claim, less about one hundred and thirty dollars. The defendant appeals.—*Affirmed.*

*Callender & Smith*, for appellant

*John A. McCall*, for appellee.

ROTHROCK, J.—I. It appears from the evidence that while the defendant was in possession of the hotel

1. AGENCY: commission for sale of real estate: custom: instructions to jury.

the plaintiff effected a sale or trade of it to one Crabb. He received no money for the property. It was mortgaged for about twelve thousand dollars, and Crabb assumed the payment of the mortgage, and conveyed to the plaintiff certain lands in the state of Kentucky. The actual value of the hotel property was from twelve thousand to fifteen thousand dollars. The defendant claims that he is a real-estate broker, and that by a verbal agreement the plaintiff authorized and employed him to effect a sale or exchange of the property, and that no sum was fixed as a compensation for his services in that behalf. He claims that he effected the sale or exchange that was made to Crabb, and that the customary and reasonable compensation for his services amounted to five-per-cent. on the first thousand dollars of the consideration for the sale, and two and one-half-per-cent. on the balance of the consideration, and that the aggregate commission was eight hundred and sixty-two dollars, for which sum he demands judgment. This was the principal matter in controversy on the trial of the case. The evidence as to whether the defendant was employed to make a sale of the property, and whether it was through his efforts that a disposition of the same was made, was in conflict.

The defendant sought to show by dealers in real estate that there was a general custom at Des Moines which established the commission for the sale of real estate at five-per-cent. on the first one thousand dollars of the consideration, and two and one-half-per-cent. on the residue. The evidence upon this question appears to have been quite uniform that the above rates were the customary charges of real-estate agents. But there is a decided conflict in the evidence as to what sum should be the basis upon which the commission should be computed. In the case at bar the plaintiff claims a commission on some thirty-three thousand, five hundred

dollars, upon an exchange of property, and the property itself was of very little more value than the mortgage upon it which the purchaser assumed. The evidence leaves it in very great doubt whether there was any usage which the parties should be held to have had in contemplation when the alleged contract was made. The court instructed the jury that if they found that there was a custom it was necessary that it should be shown that the plaintiff had knowledge of its existence. It is claimed by counsel for the appellant that this part of the charge to the jury was erroneous, because the law is that the plaintiff is presumed to have knowledge of the custom, and the burden would be on him to show the contrary. This is the rule where the custom is so general and well established that all persons dealing in the business should be presumed to have knowledge of it. As is said in *Foy v. Leighton*, 22 N. H. 75: "It must appear to be so well settled, so uniformly acted upon, and of so long a continuance as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it, and in conformity with it." 2 Parsons on Contracts, 542, 543. Applying this rule to the facts disclosed in evidence, the instructions under consideration were not prejudicial to the defendant. Indeed, we think that there was no evidence authorizing a finding that any custom existed. As we have pointed out, it was uncertain what the alleged usage was, and in that state of the record there was no presumption that the plaintiff had any knowledge upon the subject, and no ground for holding that the parties contracted with a view to any custom.

II. The lease contained the following stipulation: "It is agreed that lessee shall make all improvements he may deem necessary in the house at his own expense, but all outside and permanent improvements to be done at the

2. LEASE: construction: evidence.

expense of the lessor, and costs of same to be deducted from the accrued rents." The defendant placed a heating furnace with attachments in the house. He claims that the cost of the same should be deducted from the rent. The court held that the furnace not being outside the house, the cost thereof was not properly chargeable to the plaintiff, and oral evidence offered by the defendant in connection with the procuring of the furnace and placing it in the house was excluded. In our opinion, the ruling of the court is correct. There is nothing in the language of the lease which authorizes parol evidence varying or explaining its meaning. It plainly provides that improvements in the house deemed necessary by the defendant shall be done at his own expense.

III. The whole costs of the action were taxed to the defendant. A motion of the defendant to retax the costs, and make an equitable apportionment thereof, was overruled. This is claimed to be erroneous. It is true that the defendant admitted the plaintiff's claim, and that the amount thereof was reduced to some extent by the counterclaims filed by the defendant. But it appears from the record that nearly the whole cost of the trial resulted from the attempt to establish the claim for a commission for effecting a sale of the property. It is quite evident from the result of the trial that no part of this claim was allowed by the jury. There were, therefore, no facts from which the court could make an intelligent apportionment of the costs.

8. COSTS: counterclaim: apportionment.

The judgment of the district court is AFFIRMED.

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JAMES CANNON, Appellee, v. L. B. NELSON, Appellant.

**Tax Sale:** JURISDICTION: FORMER ADJUDICATION: ESTOPPEL. The territory comprising the county of Sioux being attached prior to the year 1860 to the county of Woodbury, the taxes upon lands located

**therein were assessed and levied for the years 1858 and 1859 by the proper officers of Woodbury county. After the organization of Sioux county in 1860, in an action brought by Sioux county against Woodbury county and the county judge thereof, it was determined by the district court of Woodbury county that the county of Sioux was entitled to collect and receive the taxes levied for the years 1858 and 1859 upon lands situated in that county, and remaining delinquent April 28, 1860. The plaintiff having brought this action to quiet his title to certain lands in Sioux county based upon a tax sale, made under the authority of the above adjudication, for the taxes of 1858 and 1859, *held*, that such adjudication never having been appealed from the defendant was estopped from denying the authority of Sioux county to make said sale:**

*Appeal from Sioux District Court.*—HON. C. H. LEWIS, Judge.

TUESDAY, JUNE 2, 1891.

ACTION to quiet title. On or about the fourteenth day of November, 1860, the treasurer of Sioux county sold the land in question for the taxes for 1858 and 1859, and the plaintiff's title deed is based upon such sale. The county of Sioux was organized on the twenty-sixth day of January, 1860, and the territory comprising the county was, before that date, attached, for revenue, election and judicial purposes, to the county of Woodbury, and the taxes for the years 1858 and 1859 were assessed and levied by the proper officers of Woodbury county, and it is said by the defendant that these facts invalidate the sale and deed on which the plaintiff relies. The plaintiff, in reply, and by way of estoppel, says that in August, 1860, Sioux county brought an action against Woodbury county, and the county judge thereof, in the district court of the latter county, wherein was presented the issue of the right of Sioux county to collect and receive the taxes levied for the years 1858 and 1859, on the land situated in Sioux county; that, upon the trial of such issue, the district court made the following findings and judgment entry:

"Now come the said parties, and submit this cause to the court upon an agreed state of facts, and, after due consideration, the court finds that the plaintiff is entitled to the taxes levied upon property in Sioux county by the defendant for the years 1858 and 1859, and remaining delinquent and unpaid the twenty-eighth day of April, 1860, and is entitled to collect the same; and for that purpose said plaintiff is entitled to a copy of the tax list of 1858 and 1859 for said Sioux county, which remained uncollected on the twenty-eighth day of April, 1860. It is, therefore, ordered that the treasurer of said defendant make out and deliver to the county judge of said Sioux county a true copy of the tax list of 1858 and 1859, for said county of Sioux, which remained uncollected on the twenty-eighth day of April, 1860; and it is further decided that the defendant is entitled to the sum of one hundred and fifty dollars for her reasonable expenses for making said copies and other services performed about said taxes of said tax list; and it is also ordered that, from and after this date, the defendant shall be enjoined and restrained from the further collection of said taxes; and it is further considered that the said defendant recover of said plaintiff the said sum of one hundred and fifty dollars, and also the costs of this suit, taxed at five dollars. Read, approved and signed in open court.

"A. W. HUBBARD,
"Judge of the Fourth District of Iowa."

The district court, in the case at bar, sustained the plea of estoppel, and gave judgment for the plaintiff accordingly, from which the defendant appeals. *Affirmed.*

*Wm. Hutchinson* and *G. R. Struble*, for appellant.

*Pitts & Kessey* and *H. T. Reed*, for appellee.

GRANGER, J.—We are to inquire as to the effect on these parties of the final degree in the case of *Sioux*

*Co. v. Woodbury Co.* The decree was entered after the assessment and levy of the taxes in question, and before their collection. The issue presented was as to the legal right of Sioux county to receive and collect such taxes, being taxes on the land then embraced within its boundaries. The issue was important to the citizens and taxpayers of the respective counties,—in fact, it may be assumed that every citizen and taxpayer had a direct interest in the result. The counties, because of their direct and also representative interest, were proper parties to the legal determination of such a question. The decree, final because not appealed from, gave to Sioux county the right to receive and collect the taxes, and enjoined Woodbury county from so doing. In pursuance of this decree, and to aid the collection of the taxes, the sale in question was made by the treasurer of Sioux county. With the correctness of that judgment, as an interpretation of the law, we having nothing to do. The court having jurisdiction of the subject-matter and the parties, its judgment is conclusive and binding on them and their privies, when properly invoked.

The query is submitted by the appellant in argument, "How could the authorities of Woodbury county pass to the treasurer of Sioux county the power and jurisdiction to sell defendant's land?" and the appellant says: "We deny that it could do it under any circumstances, even if the owner of the land had been a party to the suit, because the question involved is not one of property, but one of jurisdiction and power." This query and statement quite fairly presents points for consideration. It is unquestioned that the law gave to either the treasurer of Woodbury or Sioux county the authority to sell this land for the taxes. The counties differed in their judgments as to which treasurer possessed the authority, and by an issue properly presented the court determined the question. To

our minds, such a judgment, when final, is as conclusive upon the parties as if the issue involved the ownership of property. Some questions in argument by appellant indicate a confusion or misconception as to the proper functions of the legislative and judicial departments, as co-ordinate branches of the state government, and the effect of judicial determinations. The court by its decree did not attempt to "make law," but to declare it, which act involves a liability to err; but the judgment, because of that, is no less conclusive when final. That the judgment in the case of *Sioux Co. v. Woodbury Co.* is conclusive upon the parties to this case, and their privies is settled by the holdings in *Clark v. Wolf*, 29 Iowa, 197, and *Lyman v. Faris*, 53 Iowa, 498. These cases sustain the rule that a judgment against a county or its legal representatives, in a matter of general interest to all the people thereof,—as one respecting the levy and collection of a tax,—is binding not only on the official representatives of the county named in the proceeding as defendants, but upon all the citizens thereof, though not made parties defendant by name. It is claimed that the case is controlled by *Hilliard v. Griffin*, 72 Iowa, 331. We refer in this connection to *Pitts v. Lewis*, 81 Iowa, 51, and *Ellsworth v. Nelson*, 81 Iowa, 57, both of which are decided on the authority of *Hilliard v. Griffin*. It will be observed that this case is determined on altogether a different state of facts. It is not enough to say that the same facts could have been pleaded with like effect in all or any of these cases. The adjudication, upon which reliance is had in this case as an estoppel, was not pleaded in those cases, and they were decided without reference to that fact. Courts in one case do not take judicial notice of the records of another case. *Enix v. Miller*, 54 Iowa, 551. This case is distinguishable from those because of the adjudication pleaded. It is insisted and argued by the appel-

lant, and much importance is attached to the fact, that the courts take judicial notice of the date of the organization of counties. That courts do take such notice is settled in *Pitts v. Lewis* and *Ellsworth v. Nelson*, *supra*, but the fact is not of controlling importance in this case, because of the effect of the judicial determination between the counties.

The judgment of the district court is AFFIRMED.

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## J. A. McComb *et al.*, Appellees, v. Council Bluffs Insurance Company, Appellant.

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1. **Practice**: RECEPTION OF EVIDENCE AFTER ARGUMENT TO JURY. In an action upon an insurance policy, after the evidence had been introduced by both parties, and the opening argument to the jury had been made for the plaintiff, the defendant's counsel raised the question inargument to the court that the action was prematurely brought, as evidenced by the return on the original notice. No sufficient issue upon such question was presented by the pleadings, and it was not referred to on the trial. *Held*, that the plaintiff was properly permitted at such stage of the case to introduce evidence showing that the officer's return on the original notice had been altered by some one without authority, and that the notice had not been delivered to the officer before the time provided by law.

2. **Original Notice**: RETURN: PAROL EVIDENCE TO CONTRADICT. Where it appeared that the return of the officer upon an original notice had been altered, and that the return in fact made by him was not in existence, *held*, that it was competent to prove the date of the service of such notice by parol evidence.

3. **Practice**: WITHDRAWAL OF PAPERS FROM JURY ROOM. After the jury had retired to deliberate on their verdict, the court sent for the original notice, and, in the absence of the jury, received evidence of the person who served it as to the date of service, with a view to having the return thereon corrected, and then returned the notice to the jury. *Held*, that it not appearing that such corrected return was submitted to the jury, nor that their verdict was in any manner influenced by such proceedings, the action of the court was without prejudice to the defendant.

4. **Fire Insurance**: REPRESENTATIONS OF APPLICANT: AGENCY. Where an applicant for fire insurance truthfully answered all material inquiries in regard to the property he desired to have insured, but the agent of the insurer incorrectly recorded such answers in the written application, and the same was signed by the applicant without reading, and without knowledge that his answers had not been correctly recorded, *held*, that the insurer was bound by the acts of its agent, and that it could not escape liability upon the policy of insurance issued upon such application on account of the apparent mis-statements therein.

*Appeal from Marion District Court.*—HON. A. W. WILKINSON, Judge.

TUESDAY, JUNE 2, 1891.

ACTION on a policy of insurance to recover for a loss by fire. There was a trial by jury, and a verdict and judgment in favor of the plaintiffs. The defendant appeals.—*Affirmed.*

*R. W. Barger*, for appellant.

*Gesman & Prouty*, *Hayes Bros.*, *Frank Perry* and *S. S. Cole*, for appellees.

ROBINSON, J.—In October, 1887, the defendant issued to the plaintiff, J. A. McComb, the policy of insurance upon which this action is brought. The insurance was as follows: On building used as a mill, thirteen hundred dollars; on machinery and (exclusive of boiler and engine) shafting, gearing, cups, elevators and mill-wright work, sixteen hundred dollars; on stock of flour, five hundred dollars; on boiler and engine-house, one hundred dollars; on boiler and engine and smokestack, three hundred dollars. The loss, if any, was made payable to the plaintiff, J. R. Chambers, mortgagee, as his interest should appear. On the eleventh day of February, 1888, the building and nearly all the property insured were destroyed by fire. The plaintiffs demand judgment for thirty-eight

hundred dollars and interest, and ask that of the amount found due judgment for twenty-four hundred dollars be rendered in favor of the plaintiff Chambers on account of his mortgage. The jury returned a verdict in favor of the plaintiffs for thirty-nine hundred and seventy-nine dollars and twenty-three cents, and judgment was rendered in favor of Chambers, as requested and in favor of J. A. McComb for fifteen hundred and seventy-nine dollars and twenty-three cents and costs.

I. The appellant contends that the action was prematurely brought, and complains of numerous rulings of the district court with respect to proof of the time when it was commenced. The plaintiff sent, and on the fifteenth day of March, 1888, the defendant received, verified proof of the loss which Mrs. McComb claims to have sustained. The return on the original notice, which was on file when the case was tried, showed that the notice was served on the defendant on the fifth day of June, 1888. During the trial, after the evidence had been introduced by both parties, and after the opening argument had been made by the plaintiff, counsel for the defendant, in the course of his argument to the court, presented a question of law arising upon the return of service on the original notice. Thereupon, the plaintiff asked leave to introduce evidence for the purpose of showing that the return had been altered after it was first made, and leave was granted against the objection of the defendant. In that ruling there was no error. The question had not been referred to before during the trial, although near the close of a long answer, and in connection with other matter, the defendant had said that "this action is premature." Why it was premature was not alleged, and the statement might easily have been overlooked by the plaintiff. That the claim of the defendant that the action

1. PRACTICE: reception of evidence after argument to jury.

was prematurely brought, contrary to the provisions of section 3 of chapter 211 of the Acts of the Eighteenth General Assembly, because the original notice was served within ninety days from the time the notice of loss was given, was a surprise to the plaintiff is clear. If that was what the defendant relied upon, the defense in question should have been pleaded in a separate division of the answer, but was in fact set out in connection with an averment to the effect that the proof of loss required by the policy had not been made. Under these circumstances it was within the discretion of the court, and entirely proper to allow the plaintiff an opportunity to show that the defense was not well founded. Code, sec. 2799; *Sickles v. Dallas Center Bank*, 81 Iowa, 408.

II. It is said that the plaintiff was concluded by the return on the original notice from showing that the time of service was not as therein stated. But the evidence submitted on that question established beyond doubt the fact that the notice was not delivered to the officer for service, and was not served before the fifth day of July, 1888; that the return which the officer made showed that fact, but that it had been altered by some person, unauthorized and unknown. As the defendant was in court, it was not material to show whether the service was made on or after the date named, it having been shown that it was not made before. The return which appeared of record, so far as it related to the date in question, was not the return of the officer; and when that fact was proven, and it appeared that the official return as to that date was not in existence, it was competent to establish it by parol evidence. The right of the appellant to meet the evidence introduced was fully protected, and it sustained no prejudice from the ruling of the court.

2. Process: return: parol evidence to contradict.

III. After the evidence in question had been introduced, the case was submitted to the jury. While they were deliberating, the court sent for the original notice, and, in the absence of the jury, received evidence of the person who had served it as to the date of service. That seems to have been done with the view of correcting the return, and questions are made as to the competency of the evidence submitted and as to the action of the court in receiving it. The court authorized a new return to be made, but we do not understand that, if such a return was made, it was submitted to the jury, nor that their verdict was in any manner influenced by these proceedings; hence, the defendant cannot have been prejudiced by them if they were erroneous. Therefore, we do not find it necessary to determine the questions in regard to them which are presented by the appellant. The original notice and return which were taken from the jury room were returned to it within five minutes, and we find nothing in the circumstances attending its taking and return to justify a presumption of prejudice.

3. Practice: withdrawal of papers from jury room.

IV. The policy in suit was issued on an application to which the signature of J. A. McComb was affixed by her husband, E. B. McComb, acting as her agent. The application contains questions and answers as follows: "Is there any mortgage or other incumbrance on the property? Yes. If so, state * * * amount, and to whom. Twenty-five hundred dollars; J. R. Chambers. Will you keep barrels of salted water, with buckets, on each floor and attic? Yes." At the bottom of the application was the following: "I warrant said [foregoing] statements, representations, diagrams, descriptions and answers to be strictly true." The evidence tended to show that the incumbrance upon the property when the application was signed amounted to about twenty-eight hundred dollars, and it appears

4. Fire insurance: representations of applicant: agency.

that no barrels of salted water were kept on each floor and in the attic. But plaintiff was permitted to show by parol evidence that the application was written by the agent or agents of the defendant; that they were told, in regard to the incumbrance, that the applicant did not know the amount, but that it was about twenty-five hundred dollars; that they were told the barrels of salted water would be placed in the building as soon as it was convenient; that the application was not read to or by the applicant or agent when it was signed, and that she did not know that the answers to the questions stated were not correctly written; that when the policy was returned it was sent at once, without examination, to the mortgagee in Michigan; that the fact that the answers given were not correctly written in the application was unknown to the insured and her agent until after the loss occurred; and that it had not been convenient to place the barrels of salted water in the places designated before the fire occurred.

We do not need to consider at length the objections made by the appellant to this evidence. The questions thus presented have all been determined by this court against the claim now taken by the appellant. See *Reynolds v. Nebraska Ins. Co.*, 80 Iowa, 564; *Key v. Des Moines Ins. Co.*, 77 Iowa, 175; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 740; *Jordan v. State Ins. Co.*, 64 Iowa, 217; *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 254. We are aware that the rule of these cases is not approved by all courts, but it has been followed in this state for many years, and, it is believed, has tended to do justice. While it may offer temptation to unscrupulous persons to avoid statements they in fact made, yet it tends to make the insurance companies more careful in the selection of their agents. The applicant for insurance is not, as a rule, familiar with, and does not comprehend the force of, the various requirements of an application, and relies upon the agent to insert all

necessary statements in a proper manner. If the applicant truthfully answers all material inquiries in regard to the property he desires to have insured, it is not a hardship to require the agent to make a correct record of the answers given, and place the loss which results from his failure to do so upon his principal. The rule requires perfect good faith of the applicant, and will not tolerate intentional wrong on his part. But the presumption is always strongly in favor of the correctness of the application he has signed, and the burden is upon him to overcome that presumption by satisfactory evidence.

V. The conclusions we have announced dispose of the controlling questions in the case. Objections are urged to rulings on evidence, and against portions of the charge given to which we have not referred specially. We have examined them all and are of the opinion that there is no sufficient reason for reversing the judgment of the district court. It is, therefore, AFFIRMED.

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## N. S. FISK, Trustee, Appellant, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellee.

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1. **Practice in Supreme Court:** APPEAL: ERROR WITHOUT PREJUDICE. A judgment will not be reversed in the supreme court because of error in certain instructions to the jury, when such judgment is in accord with other instructions of the court, not complained of, and the special findings of the jury, even though the rules of law announced in such other instructions are erroneous.

2. ———: ———: ———. Error in the submission of certain interrogatories to the jury, for their special findings, will likewise, under such circumstances, be deemed upon appeal to be error without prejudice.

*Appeal from Linn District Court.*—HON. JAMES D. GIFFEN, Judge.

WEDNESDAY, JUNE 3, 1891.

THE plaintiff is the trustee of one A. Bolton. On the fifteenth day of September, 1885, at the town of Paralta, in Linn county, said Bolton was driving a team of colts on a public highway where the same crossed the defendant's railway tracks, when the team took fright because of a freight car standing on the track and in the public highway, and ran, throwing Bolton out of the wagon, and against a fence, by which he was injured. This action is to recover therefor, averring negligence in the defendant company in thus leaving its car near the traveled track in the highway. The answer puts in issue the negligence of both the railway company and the plaintiff. The jury returned a general verdict for the defendant, with the following special findings: "*Interrogatory 13.* Were Bolton's colts, or any of them, high spirited and nervous, and liable to become frightened at freight cars left standing near the roadway? *A.* Yes.

"*Interrogatory 14.* Do you find that Bolton's colts were safe to drive past freight cars standing near the roadway, as they were driven? *A.* No.

"*Interrogatory 16.* Was Bolton's team one of ordinary gentleness in respect to becoming frightened at cars standing near the roadway? *A.* No.

"*Interrogatory 17.* Was the near mare nervous and excitable, and liable to frighten and shy at objects in or near the roadway? *A.* Yes.

"*Interrogatory 18.* Were Bolton's colts as safe to drive past cars standing near the roadway as a team of ordinary gentleness, well broken and carefully driven, would have been? *A.* No.

"*Interrogatory 20.* Do you find that Bolton's colts were ordinarily gentle, and well broken, and was each one so? *A.* No."

From the judgment on the verdict the plaintiff appeals.—*Affirmed.*

*Rickel & Crocker*, for appellant.

*Mills & Keeler*, for appellee.

GRANGER, J.—I. The complaints by the appellant are as to certain instructions given relative to contributory negligence, the submission of special interrogatories to the jury, and the admission and exclusion of evidence. The appellee, however, insists that, notwithstanding the errors complained of, the judgment must stand because of the special findings and instructions of which complaint is not made. The only instruction of the series given by the court in which the facts are stated on which recovery can be had by the plaintiff is number 7, as follows: "7. If from the evidence you find that defendant placed a freight car on the highway crossing in question, or near the traveled track, or portion thereof, and left the same in such position for an unreasonable length of time, and that said car so placed was an object calculated to frighten horses of ordinary gentleness, passing along and over said highway across said crossing, and that said Bolton's team was one of ordinary gentleness, and that he was at the time in question driving said team along said highway and over said crossing in an ordinarily careful manner, and that, while so driving the same, they were frightened at said car, and became unmanageable, and ran away with said Bolton, and he was thrown out and injured, then the defendant is liable for the damages to said Bolton directly caused by such injuries, unless said Bolton's own negligence contributed to produce such injuries."

1. PRACTICE in supreme court: appeal: error without prejudice.

The correctness of this instruction as a statement of the law is not questioned in this court, and counsel in argument agree that it must stand unquestioned as the law of the case. It is not, however, to be regarded

as approved by this court. It is the rule, followed by this court, that the jury must regard the instructions given, even if incorrect, and for a failure to do so a new trial will be granted. *Boyer v. Riley*, 41 Iowa, 13. With these facts and rules of law in mind, we may readily dispose of the principal controversy in the case. By the instruction the jury is told that to find for the plaintiff it must find that the team driven by Bolton "was one of ordinary gentleness." The jury did not find so, but, on the contrary, found that it was not one of ordinary gentleness. (See special findings.) This finding of fact was in no way influenced by the instructions complained of by the appellant, and, had such instructions been in accord with the appellant's view, the result could not have been different. If, then, the instructions are erroneous, the error is without prejudice. With this view and our conclusions as to the remaining questions in the case, it is not necessary to determine the correctness of the instructions complained of.

II. The court submitted to the jury twenty interrogatories at the request of the defendant, to which answers were returned. The appellant now complains that it was error to submit them. The record shows that at the time the plaintiff objected to the submission of interrogatories numbers 10, 11 and 12, which, with the answers, are as follows:

2. —: —: —.

"*Interrogatory 10.* At what place were Bolton's injuries received, and how were they caused, and how far from the tracks? *A.* At roadside, near crossing, by being thrown from his buggy onto fence post and ground, about one hundred feet north of tracks.

"*Interrogatory 11.* Was Bolton injured before his wagon wheels struck the tie by the roadside? *A.* No.

"*Interrogatory 12.* If Bolton's wagon wheels had not struck the tie by the roadside, and thrown him

against the fence wire, would he have received the injuries complained of? *A.* No."

It must be seen at a glance that these questions could in no way affect or change the result under our holding in the first division of the opinion. Inasmuch as objection was made to a part of the questions, and not to others, at the time of submission, we must assume that the submission was by consent implied, if not expressed.

III. It is said that there is no testimony as a basis for the submission of interrogatory number 13, but that is a misapprehension, as it is in evidence that Mr. Bolton said that the team was "always afraid of a car standing still." There is also other evidence to the same point. The evidence complained of, both as to exclusion and admission, was directed to points other than that held to be conclusive of the case, and need not be considered.

The judgment is AFFIRMED.

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## A. M. GARRETT, Appellant, v. WESTERN UNION TELEGRAPH COMPANY, Appellee.

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| 102 | 222 |
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| 83 | 257 |
| 144 | 619 |

1. **Telegraph Companies:** NEGLIGENCE: CONTRACTS LIMITING LIABILITY: DAMAGES. The failure of a telegraph company to send a night message delivered to it under an agreement that the sender would not claim damages for errors or delays, or for non-delivery of such message, happening from any cause, beyond a sum equal to ten times the sum paid for transmission, will, notwithstanding such agreement, render the telegraph company liable for the actual damage sustained.

2. ———: ———: DAMAGES. A cattle buyer on his way to Kansas City, Missouri, delivered to the defendant at Columbus Junction, Iowa, to be sent to his agents at Chicago, the following message: "Send me market Kansas City, to-morrow and next day." It appeared that under the arrangement between the plaintiff and the agents to whom said message was addressed the said agents were not to answer if there was no change in the market since their last report, but if there was a change they were to answer by giving him the advance or decline. The plaintiff, receiving no answer to his

telegram at Kansas City, bought a large number of cattle in the belief that there was no change in the market at Chicago, when in fact there was a decline in prices. *Held*, that it should have been left to the jury to determine whether under all the facts and circumstances of the case the damages sustained by the plaintiff were such as the plaintiff might reasonably have apprehended would result from a failure to send the plaintiff's message.

3. ———: ———: ———: PROXIMATE CAUSE. If the plaintiff in making his purchases at Kansas City acted upon the absence of any reply to said message, *held*, that the damages resulting from such purchase, through ignorance of the decline in prices at Chicago, were direct and not speculative.

4. ———: ———: ———. It appeared that the Chicago market for cattle was posted on the bulletin boards of the stock exchange at Kansas City, and, that if the plaintiff had consulted these, he would have been advised of the decline in the market before he made his purchase. *Held*, that it was for the jury to determine, whether the plaintiff, as a reasonably prudent man, ought not to have relied upon his message to his agents at Chicago, under the arrangement above referred to.

*Appeal from Louisa District Court.*—HON. W. R. LEWIS, Judge.

WEDNESDAY, JUNE 3, 1891.

ACTION to recover damages for failure to transmit and deliver a telegraphic message. There was a trial by jury, and a verdict and judgment for the plaintiff for sixty cents. The plaintiff appeals.—*Reversed.*

*R. Caldwell* and *L. A. Riley*, for appellant.

*Arthur Springer*, for appellee.

ROTHROCK, J.—I. The evidence in the case shows that the defendant is a resident of Louisa county, and that at the time of the wrongs complained of by him, and for some time before that, he had been in the business of buying and shipping live-stock to the Chicago market. His operations were not confined to his immediate neighborhood, but he bought and shipped

1. TELEGRAPH companies: negligence: contracts limiting liability: damages.

on the Rock Island railroad, at points between Muscatine, Iowa, and Kansas City, Missouri, and including those places. On the evening of the twenty-eighth of June, 1888, he left his home in the country, and went to Columbus Junction, on the Chicago, Rock Island & Pacific railway and took passage for Kansas City. Before leaving Columbus Junction he wrote and delivered to the operator of the defendant at that station a message, of which the following is a copy:

"June 28, 1888.

"*To Gregory, Cooley & Co., U. S. Yards, Chicago:*—

"Send me market Kansas City, to-morrow and next day. A. M. GARRETT."

When he delivered the message to the operator he gave fifty cents in payment for its transmission. The plaintiff arrived in Kansas City about nine o'clock the next morning, and went to the stock yards for the purpose of buying cattle. He went to the telegraph office in the stock-exchange building several times, gave his name, and inquired for an answer to the message which he had sent the night before. He made these inquiries until two o'clock in the afternoon, and he then went into the stock yards and bought one hundred and forty-seven cattle. At the time of his purchase the price of cattle in Chicago was fifty cents per hundred less than it was on the day before the plaintiff delivered the message to the defendant's agent at Columbus Junction. It appears in evidence that Gregory, Cooley & Co., to whom the message was addressed, was the commission firm which received, handled and sold the shipments of cattle made by the plaintiff, and had done so for several years; and the evidence shows that there was a business arrangement between the plaintiff and Gregory, Cooley & Co., by which they were to keep him advised by telegraph of the cattle market in Chicago. This arrangement was as follows: If the plaintiff asked Gregory, Cooley

& Co. for the state of the market by telegraph, and there was no change from the last report, no answer to the telegram was received, and the plaintiff acted upon the last report. If there was a change, then Gregory, Cooley & Co. answered the telegram of the plaintiff, by giving him the advance or decline on the previous report. There is evidence tending to show that there was a report made by said commission firm to plaintiff on the twenty-seventh day of June, 1888, and that the plaintiff bought the cattle at Kansas City relying on that last report, and that, if his message had been sent, delivered and answered, he would not have made the purchase. The evidence tends quite strongly to show that the message was not sent from Columbus Junction, and that it was on a hook in the office, and that no attempt was made by the operator to transmit it to Gregory, Cooley & Co. It is true there is some conflict in the evidence on this question, but, as it was material to the rights of the parties, it was a proper question to be submitted to the jury. It is shown, without conflict, that the message was not at any time delivered to Gregory, Cooley & Co. There is evidence to the effect that the Chicago market for cattle was posted on the bulletin boards at the stock exchange in Kansas City, and that, if the plaintiff had consulted these reports, he would have been advised of the decline in the market before he made his purchase; and two of the members of the firm of Gregory, Cooley & Co. testified on the trial as witnesses that, if the plaintiff's message had been received by them, they would have immediately answered it, and advised the plaintiff of the decline in the market.

At the close of the introduction of the evidence, the court instructed the jury that, under the pleadings and the evidence, there could be no recovery by the plaintiff except for the sum paid by him for sending the message, and interest thereon at six per cent.

Under this instruction the jury returned a verdict for sixty cents. There is nothing in the record showing upon what ground the jury were instructed that the plaintiff could not recover damages. The message which the plaintiff delivered to the operator was what is known as a "night message." It was written upon a blank furnished by the defendant. There was printed matter on the blank, and, among other words thereon, there was the following:

"The Western Union Telegraph Company will receive messages to be sent, without repetition, during the night, for delivery not earlier than the morning of the next ensuing business day, at reduced rates; but in no case for less than twenty-five cents tolls for a single message, and upon the express condition that the sender will agree that he will not claim damages for errors or delays, or for non-delivery of such message, happening from any cause, beyond a sum equal to ten times the sum paid for transmission; and that no claim for damages shall be paid unless presented in writing within thirty days after sending the message."

Whatever right the defendant may have, if any, to limit its liability, or provide against the negligence of its agents in the transmission of messages, there can be no question that the language above quoted cannot be held to excuse the defendant for a failure to send the message, or to make the attempt to do so. The exemption provided for by the printed blank was for errors or delays, or non-delivery to the person to whom it was addressed, and not for a failure to make an attempt to send it. But suppose it be conceded that an attempt was made to send the message. The evidence shows without conflict that it was not at any time delivered, and the defendant fails to show that any effort was made to deliver it to Gregory, Cooley & Co. In this state of the evidence, the restriction as

to the liability of the defendant is no defense to the action, for the reason that the defendant cannot by contract limit its liability for the plain and palpable negligence of its operators and agents. The defendant cannot contract against its own negligence. This rule was announced by this court in *Sweatland v. Telegraph Co.*, 27 Iowa, 433; and we think it is now the settled law of this country. *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Tyler v. Telegraph Co.*, 60 Ill. 421; *Wolf v. Telegraph Co.*, 62 Pa. St. 83; *United States Tel. Co. v. Gildersleve*, 29 Md. 232; *Ellis v. Telegraph Co.*, 13 Allen, 226; *Parks v. Telegraph Co.*, 13 Cal. 422; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Hibbard v. Telegraph Co.*, 33 Wis. 558; *Manville v. Telegraph Co.*, 37 Iowa, 214. These and a large number of other cases which might be cited sustain this doctrine. It appears to us that the rule is eminently just. The contrary doctrine would, in effect, enable telegraph companies to undertake the transmission of messages, and by the same contract exonerate themselves from all liability for failure to perform the service by reason of the carelessness or negligence of their agents or operators in failing to attempt to perform the service. It would be a marvelous doctrine to hold in this case that the defendant could fail to attempt to send the message as it contracted to do, and exonerate itself by paying back to the plaintiff the nominal sum it received for the service. If its liability is to be measured by that standard, its contract is a sham and a deception. It could perform or not perform, at its pleasure, and escape all liability for the consequences of non-performance.

II. The next question arising on the record is whether the form of the message was such as that the defendant can be properly chargeable with the alleged damages incurred by the plaintiff. It has often been said that a party who fails to

2. ——: ——: damages.

perform a contract is liable for such damages as the parties to the contract may fairly and reasonably have apprehended would result from a breach. This does not mean that the parties to the contract contemplated the exact results. It is enough if it may fairly be found from the language of the contract, and the circumstances which were within the personal knowledge of the parties, that there might be serious consequences attending a breach of the contract. The message involved in this case did not apprise the defendant's agent at Columbus Junction, by its terms, that the plaintiff was on his way to Kansas City to purchase cattle, and that he would rely on the answer to the message in making his purchases. But it did, in effect, advise the agent that he was on his way to Kansas City, and that he desired market reports to be sent to him at that place. The evidence shows that the plaintiff had sent and received a great many messages from that office. We think it was, to say the least, a proper question to submit to the jury to determine whether, in view of all the facts and circumstances surrounding the parties, the defendant ought to be charged with knowledge that the plaintiff intended to act upon the result of his message in buying or selling cattle, and that it pertained to transactions which might involve loss; and, as it appeared that by the arrangement between the plaintiff and Gregory, Cooley & Co., that no answer to the message was equivalent to an answer that the market was unchanged, the question of substantial damages should have been submitted to the jury.

III. The next question properly to be considered is whether the plaintiff, if he acted upon the fact that he received no message as equivalent to an answer that the market was unchanged, was entitled to have the jury consider whether he was damaged in a substantial manner. In other words, were the damages he claims the direct

8. —: —: —: proximate cause.

result of the defendant's failure to perform its contract, or were they remote and speculative? In the case of *Western Union Tel. Co. v. Hall*, 124 U. S. 444; 8 Sup. Ct. Rep. 577, it appeared that Hall sent a message to his agent instructing him to buy for him ten thousand barrels of petroleum. Petroleum was at that time selling for one dollar and seventeen cents per barrel, and the evidence showed that the agent would have bought at that price; but the telegram was delayed through the negligence of the telegraph company, and the price had advanced to one dollar and thirty-five cents per barrel when the message was actually received by the agent, and he did not buy. It was held that Hall could not recover the difference in the price of the oil, because he suffered no actual loss, and was entitled to nominal damages only. But that was unlike the case at bar. Here the jury should have been directed to determine whether the plaintiff acted upon his advices from the commission men, or, rather, the absence of a message from them, and, if he so acted and made a purchase, his loss was direct and proximate, and not remote and speculative. In the cited case it is said: "Where the negligence of the telegraph company consists, not in delaying the transmission of a message, but in transmitting it erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual losses, based upon charges of market value, are clearly within the rule for estimating damages." See, also, *Turner v. Telegraph Co.*, 41 Iowa, 458. Under this rule, if the defendant's agent at Columbus Junction did not transmit the message, and the plaintiff acted upon the fact that he received no reply thereto, he would be entitled to recover such damages as he sustained by purchasing the cattle in the belief that his message had been transmitted.

IV. It is urged in argument that the plaintiff should have protected himself by ascertaining the market value of cattle in Chicago before his purchase at Kansas City. This was a question for the jury. It was not a question of law to be determined by the court. If that feature of the case had been submitted to the jury, and it had been found that the plaintiff, as a reasonably prudent man, ought not to have acted upon the message which he sent to Gregory, Cooley & Co., and his arrangement with them in reference to their correspondence by telegraph, then there could be no recovery. But the court submitted no question to the jury, and, for the reasons above pointed out, we think such a disposition of the case should have been made. REVERSED.

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LINDA BLOCKER, Appellee, v. FRITZ SCHOFF, Appellant.

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| 94 | 696 |
| 83 | 265 |
| 97 | 215 |
| 83 | 265 |
| 108 | 475 |
| 83 | 265 |
| 144 | 40 |

1. **Practice in Supreme Court:** ASSIGNMENTS OF ERROR. An assignment of error to a ruling upon a demurrer, that the court erred in sustaining the demurrer to a count specified in a pleading, where several grounds of demurrer are set forth, involving different questions, is too general to entitle the appellant to have such ruling reviewed in the supreme court.

2. **Slander:** GOOD FAITH: DAMAGES. The belief that a slander is true, and the good faith of the person uttering the same, may be shown in mitigation of damages, but will not prevent the recovery of substantial damages for the injury sustained.

3. ———: DAMAGES: INSTRUCTIONS TO JURY. The jury were instructed that certain matter set forth in the instructions was pleaded by the defendant in mitigation of damages, and that, if established, it should be considered by them in estimating the damages to which the plaintiff was entitled. *Held*, that the jury must have understood that the matter in question was to be considered in mitigation of damages.

4. ———: MALICE: EXEMPLARY DAMAGES. In an action for slander proof that actionable words were spoken is sufficient evidence of malice to warrant an instruction to the jury that if they found that the slander in question was uttered by the defendant with actual malice they should allow the plaintiff exemplary damages.

*Appeal from Clinton District Court.*—HON. C. M. WATERMAN, Judge.

WEDNESDAY, JUNE 3, 1891.

ACTION on account of an alleged slander. There was a trial by jury, and a verdict and judgment in favor of the plaintiff. The defendant appeals.—*Affirmed.*

*P. B. Wolf*, for appellant.

*W. C. Grohe* and *Ellis & McCoy*, for appellee.

ROBINSON, J.—I. The plaintiff was twenty years of age when this action was commenced, and had never been married. She alleges in her petition that in September, 1888, at or near Lost Nation, Iowa, the defendant falsely and maliciously said of and concerning her: "She gave birth to an illegitimate child while she lived in Ida Grove, Iowa, and I can prove it." The first division of the answer contains a general denial; the second pleads matter in mitigation of damages; and the third alleges, "as a complete defense" to the action, in substance, that it was currently reported, and generally believed, at Lost Nation and vicinity, that the plaintiff did give birth to a child; that the defendant believed the report to be true, and whatever he said with reference to the plaintiff was what he had heard as to the report, and was only said in strict confidence to one Sellers, who was at that time an intimate personal friend of the defendant, who was "keeping company" with plaintiff; that all he told Sellers was that there was a rumor at Lost Nation, which was the home of the plaintiff, that she had given birth to a child; that what was said to Sellers was told because he considered that Sellers had an interest in and a right to know what was

1. PRACTICE in supreme court: assignments of error.

said of the plaintiff. A demurrer was filed, as we understand the record, to the third division of the answer erroneously described as the second, based upon three grounds, stated as follows:

"*First.* The said answer or count does not aver that defendant sustained any relation to said Sellers, whereby defendant was interested or would be affected in property, reputation or otherwise, on account of said Sellers keeping company with said plaintiff. *Second.* It is not a justification to speak falsely concerning a young lady, and ruin her character in the estimation of a young gentleman keeping her company on account of or on the ground of friendship or protection of such gentleman's interests. *Third.* Said matter is pleaded as a justification or a privileged communication, and does not state facts which amount to such justification."

The error assigned as to the ruling on the demurrer is that "the court erred in sustaining the demurrer to the second count of the defendant's answer." The appellee objects that the assignment is too general, and we think the objection is well taken. The different grounds of the demurrer present different questions, and, according to the rule repeatedly announced by this court, the assignment is insufficient, and cannot be considered. Code, sec. 3207; *Town of Waukon v. Strouse*, 74 Iowa, 548, and cases therein cited.

II. The appellant discusses the correctness of numerous rulings of the court in regard to the admission of evidence. The appellee contends that the questions thus discussed are not sufficiently presented by the assignments of error. The assignments are of the same character as those held insufficient in *Albrosky v. Iowa City*, 76 Iowa, 301, and other cases. Following the rule of those cases, the assignments must be disregarded.

III. The court refused the request of the defendant to instruct the jury as follows: "If you find from

2. SLANDER: good faith: damages.

the evidence that the defendant did not originate the story that plaintiff had a child out West, but only told what he had heard, and told it as hearsay, that is, not as knowing the facts himself, only that he heard others say so; and, if you further find that he believed said story to be true, and told the same in confidence and good faith to one Sellers, under the honest belief that Sellers had an interest in knowing what was said of the plaintiff, and not with any intention of injuring the plaintiff or doing her any wrong,—then, and in that event, your verdict will be not for more than nominal damages in favor of the plaintiff."

The instruction was properly refused. The belief and good faith of the defendant in uttering the slander, if proven, might be considered in mitigation of damages, but would not prevent the recovery of substantial compensation for the injury sustained. The instruction also ignores the fact that, even though the defendant believed the statement in question to be true, and though he made it to Sellers thinking that he had an interest in knowing it, yet, if made maliciously, he would be liable for more than nominal damages. A person who repeats a slander does so at his peril, and cannot escape the consequences which naturally follow his act, because, although mistaken as to the fact, he acted in good faith. Whether the defendant stood in such relation to Sellers as to make it proper for him to volunteer the statement he made is a question we need not determine. What we have said in regard to the instruction just considered disposes of several questions presented in regard to the second instruction asked by the defendant and refused, and in regard to portions of the charge given.

IV. The appellant complains of the sixth paragraph of the charge on the ground that it did not

3. ——: damages: instructions to jury.

instruct the jury that, if they found the matter pleaded by the defendant in mitigation of damages to be true, they should consider it in mitigation of damages. We do not think the complaint is well founded. The jury were told that the matter in question was pleaded in mitigation of damages, and that, if true, it would not constitute a complete defense to the suit, but, if it was established, they should consider it in "estimating the damages to which plaintiff is entitled." It must be assumed that the jury were possessed of at least ordinary intelligence, and, if they were, they could not have understood that they were at liberty to consider the facts pleaded in mitigation of damages, and proven for the purpose of increasing the amount to be allowed the plaintiff.

V. The jury were instructed, in effect, that, if they found for the plaintiff, and also found that the slander in question was uttered by the defendant with actual malice, they would be authorized to allow the plaintiff exemplary damages. The appellant contends that there was no evidence of actual malice. The words the defendant is charged with having used are actionable, and proof that they were spoken is evidence of malice. There was other evidence admitted which tended to strengthen the presumption of malice. In our opinion, the objection of the appellant is not well founded.

4. ——: malice: exemplary damages.

VI. Other questions are discussed by counsel which are not of sufficient importance to receive special mention. We find no error in the record prejudicial to the defendant.

The judgment of the district court is, therefore, AFFIRMED.

# M. H. GREENFIELD, Appellee, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

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1. **Railroads:** NEGLIGENCE: FIRE: EVIDENCE. In an action to recover damages sustained by the destruction of certain hay, fence posts and growing trees, by fire, alleged to have been set by sparks from the defendant's engines, it appeared that the fire started in a field about one hundred and sixteen feet from the defendant's right of way, and several witnesses testified that the fire was first seen within a few minutes after the passing of one of the defendant's trains, and that no fires and no person setting fires, had been seen in that vicinity that day. *Held*, that, notwithstanding the absence of all evidence as to the extent and course of the wind at the time of the fire, the evidence was sufficient to sustain the finding that the fire was set by the defendant's engine.

2. ———: ———: ———: ———: PRESUMPTIONS: INSTRUCTIONS TO JURY. Proof of damage by fire, set by sparks from a railway company's engine, raises a presumption of negligence on the part of the company, which cannot be said, as a matter of law, to be overcome by proof that the engine in question was supplied with the best appliances to prevent the escape of fire, and was in good repair at the time, and that the same was not negligently handled. Under such circumstances, *held*, that the question of the company's negligence was properly left to the jury.

3. ———: ———: ———: DAMAGES. The fire having destroyed two acres of native maple and box-elder growing trees, which it was the plaintiff's intention to use from time to time for wood and other timber, *held*, that the plaintiff was entitled to recover the difference in the value of the timber just before and its value just after the fire.

*Appeal from Harrison District Court.*—HON. C. H. LEWIS, Judge.

WEDNESDAY, JUNE 3, 1891.

ON the first and second days of April, 1889, the plaintiff lost by fire some hay, fence posts and growing trees. This action is to recover from the defendant company, on the ground that the fires were set by passing engines. There was a judgment for the plaintiff, from which the defendant appeals.—*Affirmed.*

*Hubbard & Dawley*, for appellant.

*S. H. Cochran*, for appellee.

GRANGER, J.—I. It is insisted by the appellant that the evidence is not sufficient to sustain a finding that the fires were set by the defendant's engines. We give the appellant's statement of the evidence bearing on this point: There were two fires. The first fire occurred April 1, 1889, about five o'clock in the afternoon. Samuel Boone testified: "A train had just passed before I saw the fire, and I noticed it in a few minutes. * * * I had not seen any fire in that vicinity that day, before the train passed. * * * No fire was set out on that place that day by myself or anyone in my employ." M. A. Boone testified: "I was planting potatoes on the west side of the track. A passenger train passed along the track just before the fire sprang up. A few minutes after the train passed I saw the fire spring up on the other [east] side of the track. I did not see anybody pass along the public road at the time the train passed by. Did not see any fire in that same place, or near where that fire sprang up, that same day." Paul Bostwick testified: "I saw the smoke of the first fire. Think I was not more than a mile and a half away about the time I saw the smoke. I had seen a passenger train going west. Cannot state how far the fire had progressed when I first saw the smoke. I was not where I could see the fire." This first fire started on Samuel Boone's land, and spread thence to the plaintiff's premises. Between Boone's land and the defendant's right of way there is a public highway of the ordinary width, namely, sixty-six feet. The right of way is one hundred feet wide, with the track in the center. The second fire happened on the next day, April 2. As to this one, Samuel Boone says: "We

1. RAILROADS: negligence: fire: evidence.

noticed it just after the passenger train went by; just at the time, about. We noticed it right away. Happened to be sitting, looking at it. The fire sprang up about as far from the right of way as the first one. It began on Matthew Hall's land." S. C. Cherry says: "It was only a minute or two after this engine or train passed before I saw this fire, the size of a man's hat, spring up. Did not see anybody around there setting a fire anywhere that day." Paul Bostwick says: "It could not have been more than four or five minutes after I saw this train pass before the fire sprang up."

The fire started in a field about one hundred and sixteen feet from the railway track. No other fires, or persons setting fires, were seen near there on those days. We think no jury or disinterested person could or should hesitate to find that the fires were set by the defendant's engines. As against such a showing, a jury should not allow suppositions or conjectures that the fires might have occurred in some other way, to defeat a finding of the fact as it appears from the evidence. It is said there was no evidence "showing how hard the wind blew, in what direction it was blowing, or that there was any wind at all;" that there was no evidence "to show that an engine can possibly set a fire at this extraordinary distance from the track;" or "that the fires might not have been set by some one else." The evidence, however, did show a cause or means for the fire to originate; and the occurrence of the fires in point of time with the passing engines, in the absence of all evidence as to the extent and course of the wind, would justify a belief that the conditions in these respects were favorable. It is a matter, too, of common knowledge that sparks and cinders from engines will go a distance of one hundred and sixteen feet or more; and, in the absence of any other cause, a belief that fire originated therefrom may be well founded.

II. The defendant asked an instruction as follows: "3. The defendant has shown, by evidence, which is uncontradicted, that the engines which it is alleged set out the fires in controversy were supplied with the best appliances to prevent the escape of fire, and were in good repair at the time, and that the engines were not negligently handled. It has, therefore, relieved itself from liability, and you should find for the defendant." The court refused the instruction, and gave the following: "9. Whether the testimony of the defendant's employes is sufficient to overcome the presumption of negligence, and the facts and circumstances, is solely for your determination; and, in determining that fact, consider all the evidence, facts and circumstances in the case." The case of *Small v. Chicago, R. I. & P. Ry. Co.*, 50 Iowa, 338, in construing Code, section 1289, wherein it is provided that a corporation "operating a railway shall be liable for all damages by the fire that is set out or caused by operating of any such railway," holds that the section does not impose an absolute liability for such damage, but that liability depends upon the fact of negligence, and, in effect, that proof of damage by fire is a *prima facie* showing of negligence; or, in other words, proof of damage by fire raises a presumption of negligence by the company, which, to avoid liability for, it must overcome by proof. This presumption, it is urged to us, is one of law, and hence it is the province of the courts * * * to decide what is sufficient to overcome it." The instruction asked and refused is in harmony with this view. We do not, however, understand the appellants to urge that, in cases of conflicting or contradictory evidence, the court, instead of the jury, should decide such questions; for it is said in argument: "Of course, if the testimony of witnesses is itself contradictory, so that different conclusions may

2. ——: ——: ——: ——: presumptions: instructions to jury.

be reasonably drawn from it, then it would be proper to submit it to a jury." The proposition, then, resolves itself to about this: If the evidence is such that but a single conclusion can properly be drawn from it, there is no question of fact for a jury, and the court should declare the law applicable to unquestioned facts. About such a proposition there should be no controversy. The difficulty is more with the condition of the record to show the facts as a basis for the proposition urged. Defendant's negligence, by the finding that the fires were set by the engines, is a fact in the case, unless, for the purpose of the question now under consideration, it is by the defendant's evidence conclusively disproved. Negligence, being presumptively established, has for its support every fact by which it might have been established upon proof; or, in other words, a party disproving negligence must negative every fact the proof of which would justify a finding of negligence. The engines supposed to be the ones that set the fires are numbers 629 and 631. The engineer of number 629 gave the following testimony as to the condition of the engine: "In my engine the diaphragm in front of the flues is solid. The draught passes under the diaphragm through the netting. The ends of the flues are right back of the diaphragm. The screen netting on the inside of the extension part is keyed in there when the engine is in use, with four keys, closed tight. There is no way for cinders, in coming from the firebox through the flues, to get out of that engine, except through the smokestack, and there is no way to get through the smokestack except through the netting. In coming through the flues they strike the diaphragm, which is horizontal,—slanting. There is nothing better known than this extension front to prevent the escape of fire. It is in general use on all railroads. A netting will last, in one of these extension fronts, from a year to three years. It does not wear out as fast as that in the old

diamond stack. The diamond stack wore out in thirty days. I don't know that I ever saw any sparks strike the ground from my engine. I have seen sparks go out of the stacks, and I have watched them lots of times, and I never saw them strike the ground alive. The cinders accumulate and we dump them out. The great bulk of the cinders do not get through the screen. When it gets filled up we dump them. We don't get any steam if we don't." The court said to the jury "that the use of more or less steam, or a low or high rate of speed, is not evidence of negligence," in regard to handling the engines; and, without approving the rule, it must be taken as the law of the case, for no assignment brings it in question. But, with the facts stated as to the condition of the engines, and that there was no negligence in the use of steam or the rate of speed, can we say that it conclusively appears that the fires were not the result of negligence? In how many different ways the company could have been negligent, so as to have caused the fires, it would be difficult to state; and herein is manifest the exceeding difficulty of overcoming the presumption of negligence by negative proofs. The most that can be said of the proofs in this case is that the fires were not caused by certain acts of negligence. They do not show that the fires were not caused by other acts of negligence in the use of the engine, of which there might be many. The presumptions of the case devolve upon the defendant the burden of showing a negative of such facts, or, at least, to negative an inference of negligence arising therefrom. It may be thought that the rule devolves on railway companies nearly, if not quite, an impossibility of proof in such cases. But that fact cannot change the result. The construction of section 1289 of the Code required a holding of absolute liability for such fires, or such a rule as this as to presumptions.

In the state of Minnesota, when fires are set by a locomotive, the same presumption of negligence seems to obtain; and while the case of *Dean v. Chicago, M. & St. P. Ry. Co.*, 39 Minn. 413; 40 N. W. Rep. 270, differs in some essential particulars from this case, it involves to some extent the same inquiries and application of legal rules; and the court, on the question of the engine being in good repair, intimates a particular in which it might not have been so, as to which there was no testimony. This reference is made only in furtherance of the thought that all facts that might support negligence must be disproved in such a case. The fact was found, and the case must be treated, for the purpose of this question, with the conceded fact, that the engines set the fires. It is, then, proper to consider how large a cinder, spark or coal would live to reach the distance of one hundred and sixteen feet, with the material into which it dropped. These facts, in the minds of the jury, might be sufficient to discredit the testimony of the engineers or others as to the condition of the engine. This particular branch is discussed in *Babcock v. Railway Co.*, 62 Iowa, 593; s. c., 72 Iowa, 197. We are clearly of the opinion that the question of negligence was one for the jury, and that there was no error in refusing the instruction asked.

III. One item of damage for which the plaintiff claimed was two acres of maple and box-elder trees, and for a measure of such damage the court said to the jury: "If you find that the fire ran to the timber of the plaintiff, and burned and injured it, then award him, on account thereof, that sum which represents the difference in the value of the timber just before and its value just after the fire." The appellant's position is that the value of the timber "is such as it might have for cord-wood." The testimony shows that the timber consisted of native growing trees, which the plaintiff was permitting to grow with

3. —: —: —: damages.

the intention of using it from time to time for wood and other timber. The plaintiff on his own behalf, as a witness, said: "I think I know the reasonable market value of such timber land at or about the time of the fire." He was then asked, "What was its reasonable market value before the fire burned it, per acre? *A.* Twenty-five to thirty dollars per acre.

"*Q.* What was its reasonable market value after the fire cut through it, and burned it up, per acre, if you know? *A.* I don't think it was of any value."

This testimony was given under objections as to its competency, and the objections are urged in connection with the assignment as to the instruction refused. It is perhaps fair to say that the instruction considered, in connection with the evidence on which it was based, gave to the jury a rule that the measure of damage was the difference between the value of the timber before and after the fire. The appellant, however, argues the case on the theory that the instruction authorized the jury to consider the damage in connection with the farm. We think neither the evidence nor the instruction authorized such a consideration. No reference is made to the farm in the testimony or instruction. The evidence was as to the value of the timber land, and the instruction is certainly not broader. The plaintiff's damage is not limited to the value of the timber for cord-wood. It was growing timber, being kept for its growth, and had a value in that respect. It was a part of the realty, and its loss affected the value of the realty. It is manifest that the plaintiff suffered no less damage than the difference in the value of the timber land before and after the fire. The testimony was properly directed to such a measure of damage, and the instructions are in harmony with that view. In *Montgomery v. Locke*, 13 Pac. Rep. (Cal.) 401, it is stated that the means by which to determine the damage occasioned by the removal of forest trees, having no value except

as timber, must be quite different from that pursued in determining the value of fruit trees; and it is said that the latter must be estimated with reference to what they are worth in their growing state on the premises. In speaking of forest trees having no value except as timber, the present value must have been intended; that is, that there was no present value, except for the timber in them,—for it is difficult to believe the court would sustain a rule to thus limit the measure of damage in a case of trees of little or no value for present use, but of much value because of prospective growth.

We think the evidence and the instructions given are such that appellant should not complain. AFFIRMED.

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## V. L. COOK, Appellant, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellee.

1. **Railroads**: OCCUPATION OF CITY STREETS: DAMAGE TO ABUTTING PROPERTY. Where under authority from a city council a railway company lays its track in one of the streets of the city, the fee-simple title to which is in the public, no cause of action for damages accrues to the owner of abutting property under section 464 of the Code, because of such occupation of the street, unless his property has been actually damaged thereby.

2. ———: ———: ———: MEASURE OF DAMAGES. The measure of damages in such case is the difference between the fair market value of the property immediately before laying the track and the like value immediately thereafter, irrespective of the benefit that may have resulted to the property from the laying down of such track.

3. ———: ———: ———. An instruction that the abutting property-owner in such case is not entitled to recover damages which he or his tenants may have sustained, or will sustain, by reason of any annoyance, inconvenience or loss suffered by them in common with the rest of the public, by reason of the construction and operation of said track, *held*, proper, the jury being also instructed that depreciation in the value of the plaintiff's property on such account would entitle him to recover.

*Appeal from Linn District Court.*—HON. J. D. GIFFEN, Judge.

WEDNESDAY, JUNE 3, 1891.

ACTION to recover damages for laying down and operating a railroad track on Fourth street, in the city of Cedar Rapids. The plaintiff is the owner of a lot which abuts on the street, and opposite to which the railroad track in question was laid. There was a judgment for the defendant upon the verdict of a jury, and the plaintiff appeals.—*Affirmed.*

*Charles A. Clark*, for appellant.

*Mills & Keeler*, for appellee.

ROTHROCK, J.—I. The railroad track of which the plaintiff complains was laid in the street in the year 1883, and said track is the main line of the defendant's railroad running from Marion, through Cedar Rapids, to Kansas City. At the time the road was constructed, and for years before that time, the plaintiff was the owner of a corner lot fronting on First avenue, and extending back one hundred and forty feet along the east side of Fourth street. The last-named street had been for years practically devoted to railroad tracks. It was then the street upon which the Chicago & Northwestern and Burlington, Cedar Rapids & Northern railroads passed through the city. Before the defendant laid down its track there were three main tracks in the street, and in addition a side or spur track opposite and next to the plaintiff's lot. Fourth street is eighty feet wide. The track of the defendant was constructed in the street by virtue of an ordinance of the city authorizing such occupation of the street. In the year 1876 the plaintiff constructed a three-story brick block upon said lot. The front of the block is on First avenue, and it extends along the line of Fourth street the full length of the lot, being one hundred and forty

1. RAILROADS: occupation of city streets: damage to abutting property.

feet. The first floor of the building has continuously been used by tenants of the plaintiff as a wholesale grocery. The second floor, and part of the third floor, were for some years used by the Burlington, Cedar Rapids & Northern Railway Company for its general offices. The side of the building along the line of Fourth street is designated in the record as the "Fourth Street front." This is not entirely accurate. It is true that there are two openings in the building on Fourth street. There are two sets of large double doors placed at convenient distances, through which goods are received into the building from drays or cars, and loaded from the building in the same manner; and the entrance to the second story was by means of an outside stairway along the side of the building, and which necessarily encroached upon Fourth street. And there was a platform five feet wide in front of the side doors, which platform extended into the street, and was built and maintained to facilitate the receipt and delivery of goods. When the building was erected there were three lines of railroad laid down and operated in the street. The side or spur track was laid down at the instance of the tenants of the plaintiff, to enable them to have cars placed opposite to said double doors for loading or unloading in or out of the grocery. This was the condition of the street and the building of the plaintiff when the change was made by the construction of the defendant's track of which the plaintiff complains. The street was not of sufficient width to maintain five tracks, and the spur track was removed, and the three other lines were moved over to the west to make room for the defendant's road. It was laid down on practically the same ground as that before occupied by the spur track. It was probably one or two feet further away from the plaintiff's building than the spur track, but it was and is used by the plaintiff's tenants for the same purposes as the spur track was

used. This was about the general condition of the street and the building and lot when this action was commenced. There are many more facts in the record in relation to the *status* of the case which need not be stated. They are not necessary to an understanding of the questions involved in the appeal.

The material questions in the case are few, and, as we regard them, easy of solution. The plaintiff is not the owner of the street. The fee title is in the public, and, under the facts in this case, by the rule announced in *Milburn v. City of Cedar Rapids*, 12 Iowa, 246; *Clinton v. C. R. & M. Ry. Co.*, 24 Iowa, 455; *Slatter v. Des Moines Ry. Co.*, 29 Iowa, 148; and numerous other cases, the plaintiff could not recover damages. Presumably, in view of the fact that the fee title of the streets in nearly all the cities and towns of Iowa is in the public, and that the construction of railroad tracks in streets is in some cases attended with special injury and damage to the owners of lots abutting on such streets, the general assembly of this state, in 1873, enacted a statute providing that cities should have power "to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places; but no railway track can thus be located and laid down until after the injury to property abutting upon the street, alley or public places upon which such railway track is proposed to be located and laid down has been ascertained and compensated for in the manner provided for taking private property for works of internal improvement in chapter 4 of title 10 of the Code of 1873." See Miller's Code, sec. 464.

It is contended by counsel for the appellant that this act removed all limitations upon the right of the abutting owner of property to recover damages for the use of a street by a railroad, and that his right to recover is as broad, complete and perfect as if he owned the

fee of the street to the center, subject only to an easement for a public highway. We do not think that this position is sound. No land in which the owner of abutting property has any interest or ownership not common to the general public is appropriated for the use of the railroad. The provision that the manner of the assessment shall be the same as that provided for taking private property for public use determines no right of the owner of abutting property. It is nothing more than that the right shall be condemned by the same tribunal; that is, in the first instance by a sheriff's jury, with the right to appeal. There is nothing in the statute which gives the plaintiff, as matter of law, the right to recover damages. Before there can be any recovery it must appear that the plaintiff's property has been depreciated in value by the laying down of the railroad track in the street. The burden is on the plaintiff to establish the fact that the property is of less value by reason of the construction and operation of the road. The plaintiff's claim for damages is not based upon the claim that her property has been taken and appropriated by the defendant, but because she is the owner of the property abutting on the street. It has always been understood that, where the abutting owner had a fee to the middle of the adjoining street, the public has the right of passage over it, and to use and improve it so far as necessary for the public convenience. But this is the extent of the right. In such case, any other use of the street is an invasion of a private right, not because the abutting owner has the fee to the adjoining lots or land, but for the reason that he is the owner in fee of the street, subject only to the easement of the public. But, where the fee is in the public, no private right of the abutting owner is invaded by the mere fact that some additional servitude is attached to the land, unless the owner of the adjoining property is actually damaged thereby. The court did

not, therefore, err in omitting to charge the jury that, as matter of law, the plaintiff was entitled to recover. Even if it should be conceded that the plaintiff is entitled to some damages by laying down the railroad track, and operating it in the street, upon mere proof of the ownership of the lot the damages would be merely nominal. As she had no title in the street, in order to recover substantial damages it was necessary that she should satisfy the jury, by a preponderance of the evidence, that the lot and block were worth less money after the track was laid down than they were before; and if, as matter of law, the plaintiff was entitled to nominal damages, and by the rulings of the court and the instructions to the jury she was deprived of a verdict for a nominal sum, the judgment will not be reversed for that reason. *Watson v. Van Meter*, 43 Iowa, 79; *Rowley v. Jewett*, 56 Iowa, 497; *Phœnix Ins. Co. v. Findley*, 59 Iowa, 595; *Wire v. Foster*, 62 Iowa, 116; *Watson v. Moeller*, 63 Iowa, 163; *Norman v. Winch*, 65 Iowa, 264.

II. The court in the fifth paragraph of the charge to the jury instructed them as follows: "5. You have then two principal questions of fact to determine from the evidence before you in this case, namely: *First.* Is the property depreciated in value by the laying down and operation of the railway track in question on Fourth street, along, near and adjacent to said property? *Second.* In what sum or amount? If you determine the first of the above questions or propositions in the affirmative under the evidence,—that is, that there is a depreciation of said property as alleged,—then you will next ascertain from the evidence the full amount or sum of such depreciation, and that will be your verdict for the plaintiff. The measure of plaintiff's damages, if any, would be all the damages she was entitled to at the time of the laying down of the track, or thereafter

2. —: —: —: measure of damages.

entitled to on account thereof, as shown by all the evidence, if any, shown. In other words, the measure of damages or the extent of her recovery would be the difference between the fair market value of the property in question, if any, immediately before laying the track on Fourth street, and then the like value immediately thereafter, as disclosed by the evidence, irrespective of the benefit which may have resulted to the property of plaintiff from the laying down of the said Milwaukee track on said Fourth street. In passing upon this question of values, you may consider the nature and character and use of plaintiff's property immediately before laying the track and thereafter, and any and all inconveniences, if any, that might arise out of the peculiar use of Fourth street by the railway track in question, along, near and adjacent to said property on said street, as shown by the evidence before you."

It is claimed that this instruction is erroneous, because it implies that the plaintiff may not be entitled to any damages. As we have said, the right to recover damages depends on the evidence in the case. By this part of the charge the jury were plainly directed to the very questions of fact which they were required to determine, and the facts and circumstances disclosed in evidence tending to establish damages were plainly and correctly stated. There was no error in this part of the charge of which the plaintiff has any just cause of complaint.

III. The court further instructed the jury as follows: "11. The jury are instructed that they must not allow plaintiff any damages which she may have sustained or will sustain, if any, by reason of any annoyance or inconvenience suffered by her in common with the rest of the public, by reason of the construction and operation of defendant's said railway track upon Fourth street, as shown by the evidence. For all such damages, if

s. —: —: —.

any, plaintiff cannot recover in this action. Nor could you allow plaintiff for any inconvenience or loss, if any, which the evidence may show has been sustained to the business of the tenants Cook & Frick, by reason of the construction and operation of said railway track, and which has not directly affected the value of plaintiff's own lot in question. Plaintiff cannot recover in this action for any loss or inconvenience to the business of her tenants alone."

It is claimed that this instruction is grossly erroneous, and that it is plainly contrary to the rule of this court as announced in the case of *McClean v. Chicago, I. & D. Ry. Co.*, 67 Iowa, 570. In that case defendant asked an instruction to be given to the jury, which is substantially the same as the instruction now under consideration. The court modified the instruction asked as follows: "But, if you should find that the occupation of the street by the defendant for right-of-way purposes depreciated the value of plaintiff's property, then the depreciation of the value of the property from this cause would constitute such special or individual damages as to entitle him to recover the same." The defendant in that case complained of the modification of the instruction as erroneous. It was held not to be error. Now, while it is true that in the case at bar the court did not, in the same instruction, state the rule of the above modification, yet in other instructions, and notably in the fifth, above quoted, the jury were plainly directed that the plaintiff was entitled to recover for any depreciation in the value of her property by reason of the laying down and operation of the track in the street. The court was not required to state all the rules of law pertaining to the rights of the parties in one paragraph of the charge, nor is there any good reason why rules of law should be repeated in the charge to the jury. There is no repugnance in the different paragraphs of the charge, when construed

together, and the court, in substance, followed the rule of the cited case.

IV. Taking the whole of the instructions together, we think they were very favorable to the plaintiff. Indeed, they were exceptional in this regard. The plain fact stands out all through the record that the plaintiff's block was built upon the very line of the street, and large doors constructed in the side of the building for the purpose, in part at least, of handling goods, and moving them to and from the cars on an adjacent railroad track. The plaintiff and her tenants procured the spur track to be laid for their convenience in handling goods, and complaint is now made because the spur track was taken up, and another laid down in its place. It ought to require a most convincing state of facts to show that any substantial damages resulted from the change. It is true the court instructed the jury that, if the spur track was laid by the permission of the plaintiff, there was no adverse right to maintain it; and the plaintiff was entitled to recover damages, if any were sustained by the laying and use of the defendant's track, the same as though the spur track had not, prior to that time, been in existence. This instruction was as favorable to the plaintiff, if not more favorable, than she was entitled to, in view of the uses and purposes for which the brick block was designed; and yet, in the face of this and other instructions, in narrowing and limiting the defense to the action the jury found a verdict against the plaintiff, which, adopting the instructions as the law of the case, is fully sustained by the evidence. The evidence abundantly shows that the property of the plaintiff was not depreciated in value in any amount whatever. It is true there is a conflict in the evidence on this question, but it appears without conflict that the rental value of the property was in no way affected by the acts complained of by the plaintiff. There are other questions of minor

consequence presented in argument, which we do not deem it necessary to discuss.

It appears to us, upon a careful examination of the whole record, that there is no error therein prejudicial to the plaintiff. AFFIRMED.

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## JOSEPH HAMMANS, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

**Railroads**: INJURY TO STOCK: DOUBLE DAMAGES: TENDER. In an action for double damages for injuries to stock caused by the defendant, the latter admitted the killing of the stock, the amount of actual damages sustained to be as alleged in the petition, and that notice thereof had been duly served as provided by statute, but in excuse for its failure to make payment thereof pleaded that, before the expiration of the thirty days allowed by statute after receipt of said notice, the defendant was at the residence of the plaintiff, ready to pay him the full value of the stock injured, but the plaintiff was absent from home, and that the defendant was still ready to pay the amount of the actual damages sustained. *Held*, that a demurrer to the defendant's plea was properly sustained.

*Appeal from Davis District Court.*—HON. H. C. TRAVERSE, Judge.

WEDNESDAY, JUNE 3, 1891.

ACTION to recover double damages for stock killed and injured on the defendant's railway, the actual damage being averred in petition to be one hundred and sixty-nine dollars. The answer admits the killing and injury to the stock, and the actual damages, as alleged. In the second division of the answer the defendant pleaded facts designed to avoid a liability for double damages, because of a failure to pay within thirty days after notice in writing, which notice was properly given. The facts pleaded in avoidance of the liability for damages are, in substance, that the plaintiff is a farmer residing on the farm where the stock was injured, and has no other place of business; that before

the expiration of the thirty days the defendant "was at the place of residence of the plaintiff, ready and prepared to pay to him the full value of stock killed, and the full amount of damage done to the said stock injured, but the plaintiff was not at home nor present at his place of residence to receive such payment;" and that "defendant was unable to remain, but was and is still ready to pay to said plaintiff the amount of the full value of all the damages sustained by him by reason of the killing and injuring of said stock, to-wit, the sum of one hundred and sixty-nine dollars." To the second division of the answer there was a demurrer, on the ground that it failed "to set forth facts constituting a tender in law, but only a willingness to make a tender." The district court sustained the demurrer, and from a judgment for the plaintiff thereon for three hundred and thirty-eight dollars the defendant appeals. *Affirmed.*

*T. S. Wright* and *S. S. Caruthers*, for appellant.

*Payne & Eichelberger*, for appellee.

GRANGER, J.—The notice served on the defendant company fixed the actual damage at one hundred and sixty-nine dollars, and it is the amount that the defendant pleads a willingness to pay, both before and after the expiration of the thirty days. The appellant, as a reason for its construction of the statute providing for double damages, assumes a view of the law, as to what is required in the notice, that is erroneous. It says in argument: "The statute does not require that the notice and affidavit of loss should contain or constitute any evidence of the value of the property destroyed." In *Manwell v. B., C. R. & N. Ry. Co.*, 80 Iowa, 662, it is held that "the notice should advise the corporation of the loss of which complaint is made, and of the demands of the person injured on account of it;"

and "the notice and affidavit together should, so far as is practicable, inform the company of such material facts as will enable it to pay the amount demanded, without litigation, within the time limited." The case also holds that the actual damage is limited to the amount stated in the notice and affidavit. The appellant's theory is that the question of value is an open one, for adjustment between the parties, and that it is impossible for the defendant to settle the damages without an interview, through some agent of its selection, with the owner of the property; and hence that the owner is required "to remain in readiness for each of the thirty days elapsing after the giving of the notice, to meet the defendant or his agent, and negotiate his loss." The rule, as claimed, is without analogy in the jurisprudence of the country. Dispensing, for the purpose of argument, with the rule as to double damages, and the plaintiff could maintain his action for actual damage at his pleasure; and the defendant, to avoid judgment, would be required to adjust and pay the debt, or so act as to place the plaintiff legally in fault for non-payment, which could be done under the well-known rule of tender. He could not, however, avoid such a liability merely by showing that he was at the home of the plaintiff before suit was brought, ready to adjust and pay the damage, but was prevented because of the absence of the plaintiff. The statute makes the defendant liable for double damages, because of a failure to pay in a specified time, and no action, with a view to such damage, can be maintained within that time. Now, why is not the same rule applicable to this case as in suits for actual damage; that is, if the payment is not made within the thirty days the defendant, to avoid liability for double damages, must show the plaintiff legally in fault for the non-payment? If a tender was made, and refused, the defendant might

reasonably understand that it would not be accepted at any other time, and would excuse further effort for payment. But a willingness to pay at a particular time and place, in the absence of a law or contract fixing such time and place for performance, has never had the effect of placing the other party legally in fault for non-payment; and this rule has obtained without regard to the necessity for the parties meeting for adjustment. We see nothing in the language or effect of the statute providing double damages that should so change the rule as to require one who is injured in his property, before he can have the benefit of the statute, to establish headquarters for negotiations, and be there in readiness to receive what is actually due for thirty days or less, at the pleasure of his debtor.

It must not be understood that we hold that a legal tender is the only means of placing a party entitled to payment in fault for non-payment, so as to avoid a claim for double damage; because the statute is a peculiar one, and its purpose should be clearly in view in determining such questions, so that, on the one hand, it shall not be an instrument of wrong or oppression, nor, on the other hand, should its purpose be avoided by a technical or unsound interpretation. If it should be said that reasonable diligence to make actual payment within the thirty days would defeat a claim for double damages, still the facts pleaded in this case do not rise to the dignity of such a rule. The defendant was at the residence of the plaintiff once. Its purpose to pay was as to the plaintiff then and thereafter, to the commencement of the suit, a secret. Of all the ways open to inform the plaintiff of its willingness to pay, none were employed. In this case there was nothing to adjust as to amount, for the company concedes the amount claimed in the notice, and the notice limits the demand of the plaintiff. A simple note through the mail would likely have avoided this

suit. The rule claimed by the appellant is unreasonable, and cannot be sustained. The judgment is AFFIRMED.

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THE STATE OF IOWA, Appellee, v. CHARLES MILLER, Appellant.

1. **Robbery**: FORCE NECESSARY: EVIDENCE: INSTRUCTIONS. The defendant was indicted for the crime of robbery by means of putting in fear one G., and taking with force and violence, while armed with a dangerous and deadly weapon, a jug containing whiskey from the person of said G. The evidence tended to show that, while the defendant and G. were riding together in a hack, with the jug of whiskey belonging to G. resting on the floor of the hack near them, nor secured in any manner, and while G.'s attention was diverted, and without any resistance from him, the defendant seized the jug, leaped with it from the hack, and ran back towards the town from whence the hack had come. He was followed by G., and was overtaken after running a short distance, and after he had thrown the jug over a fence. The evidence was conflicting as to what then took place, G. claiming that the defendant, with knife in hand, compelled him to surrender the jug by threats of great bodily injury, and then carried it away; while the defendant claimed that while the jug rested on the fence in the hands of G. the latter turned to look to see some one who had called, and released his hold, and at that moment the defendant took the jug and carried it away. The court refused to instruct the jury, at the request of the defendant, that "if, at the time the defendant took the jug, the said Graham was looking out of the hack at some other object, and did not have hold of it, and it was setting on the bottom of the hack, not attached to his person, and no other force or violence was used by the defendant than merely to take hold of the jug and carry it away without the knowledge of said Graham," this would not constitute the crime of robbery. *Held*, that the instruction should have been given.

2. ———: ACTS WHICH ARE PARTS OF SAME TRANSACTION. The acts of the defendant at the hack and at the fence being so closely connected as to partake of the nature of a single transaction, *held*, that it was proper for the jury to consider the two transactions together in determining whether the defendant was guilty as charged.

*Appeal from Monroe District Court.*—HON. E. L. BURTON, Judge.

THURSDAY, JUNE 4, 1891.

THE defendant was indicted for the crime of robbery, convicted and adjudged to be imprisoned in the penitentiary at Ft. Madison for the term of one year. From that judgment he appeals.—*Reversed.*

*T. B. Perry*, for appellant.

*John Y. Stone*, Attorney General, and *Thos. A. Cheshire*, for the State.

ROBINSON, J.—The indictment charges, in substance and effect, that the defendant committed the crime of robbery on the twenty-fifth day of August, 1890, by means of putting in fear one James Graham, and by taking with force and violence, while armed with a dangerous and deadly weapon, a jug containing whiskey from the person of said Graham. It appears that on the day named Graham obtained, at the express office in Albia, a jug containing whiskey. He and the defendant thereupon drank of its contents, and continued to do so until both were somewhat intoxicated. After spending several hours in town, they got into a passenger hack with others to go to a place called Cedar. The jug, then containing about one quart of whiskey, was placed on the bottom of the hack near them. As the hack was being driven out of Albia, Graham's attention was attracted to the front end by the act of the driver in putting on the brake at the top of a hill. While Graham's attention was thus diverted, the defendant seized the jug, leaped with it from the hack, and ran back towards town. He was followed by Graham, and overtaken, after running a short distance. Just before he was overtaken the defendant threw the jug over a fence and stopped. Graham came up, got over the fence, picked up the

jug, and drank from it. As to what else occurred at the fence there is conflict in the evidence, Graham and the defendant alone testifying to it. Graham claims that the defendant was holding in his hand a knife, which seems to have been a dangerous weapon; that he drank by direction of the defendant, and was then compelled to surrender the jug by threats of great bodily injury, made by the defendant, who then carried off the jug and its contents, and appropriated them to his own use. The defendant admits that he held the knife, but claims that it was in his vest pocket, and that he took it in his hand while running to prevent losing it. He denies the alleged threats, and says that when Graham picked up the jug he drank from it, and, placing it on the fence, told the defendant to drink; that at that moment some one called, and Graham, turning to see who it was, released his hold on the jug; and that the defendant then took and carried it away.

I. There was evidence which tended to show, and the jury would have been authorized to find, that, when the defendant first seized the jug, it was standing on the bottom of the hack between two seats, and that it was not in contact with Graham, nor secured in any manner; that the only force exerted by the defendant in taking it was that required to lift and carry it away; that Graham's face was turned from the jug and the defendant, and that he had no knowledge of the taking until after it had been accomplished, and did not resist it. In that condition of the case the defendant asked the court to instruct the jury as follows: "If, at the time the defendant took the jug, the said Graham was looking out of the hack at some other object, and did not have hold of it, and it was setting on the bottom of the hack, not attached to his person, and no other force or violence was used by the defendant than

1. ROBBERY: force necessary: evidence: instructions.

merely to take hold of the jug and carry it away without the knowledge of said Graham, this does not constitute the crime of robbery." The court refused to give the instruction asked, and failed to charge the jury in regard to the matter contained in the instruction refused. It is true the jury were told, somewhat in the language of the statute, that to constitute the crime of robbery, the taking must have been accomplished by putting in fear, force or violence, but they were left to infer, and that seems to have been the theory of the instructions, that no force or violence, other than that required to remove the jug without resistance, was required to constitute the crime of robbery. It is not claimed that Graham was put in fear at the hack. In our opinion, the jury should have been instructed substantially as asked by the defendant. The common-law definitions of the crime of "robbery" show that it includes the taking of property from the person of one by means of putting him in fear, or by means of force or violence. 2 Bishop on Criminal Law, sec. 1156, and note 1; 1 Wharton on Criminal Law, sec. 846. The provisions of section 3858 of the Code are in harmony with those definitions. In *Fanning v. State*, 66 Ga. 167, it was held, that where the thief slipped his hand into a lady's pocket, and furtively took therefrom a purse of money, but before he had removed the purse entirely from the pocket he was discovered, and in removing his hand and the purse the pocket was torn, defendant was guilty of larceny from the person, and not of robbery. See also *State v. John*, 5 Jones (N. C.) 163, in which it was held that the criminal taking of money from the person of another during a scuffle was not robbery. In *Brennon v. State*, 25 Ind. 403, it was held that the taking of pocket-books from the person of one who was in an unconscious state, the result of intoxication, was not robbery, although the pockets from which the property was taken were turned inside

out in the transaction. As to whether the mere snatching of property from the person of the owner with criminal intent is the using of force or violence required to constitute the crime of robbery, the authorities are not agreed, many holding that it is not. 1 Wharton on Criminal Law, sec. 854; 2 Bishop on Criminal Law, sec. 1167. In this state the question has been decided in the affirmative. *State v. Carr*, 43 Iowa, 418, 423. The rule in regard to such snatching is stated as follows: "The true doctrine is that the snatching will be robbery if the article is so attached to the person or clothes as to create a resistance, however slight; not otherwise." 2 Bishop on Criminal Law, sec. 1167.

It is said that "a taking in the presence of an individual [of course, there being a putting in fear] is to be deemed a taking from the person" (2 Bishop on Criminal Law, sec. 1178); and that is substantially the doctrine announced by this court in *State v. Calhoun*, 72 Iowa, 432, 435. But the rule which seems to have been adopted by the district court, and which is, in effect, that the crime of robbery can be committed where there is no putting in fear and no resistance, without the use of any force or violence other than that required to take and remove the property, has no support in any of the authorities to which our attention has been called. As a rule, larceny of the simplest character cannot be committed without the use of the amount of force or violence stated. Section 3905 of the Code provides for the punishment of the crime of larceny from the person. That offense cannot be committed, however, if it be true that a mere taking of the property, which is not in any manner resisted, and which is not accomplished by putting in fear, when the force or violence employed is merely that required to remove the property. In our opinion, the force and violence required to constitute the crime of robbery must be designed not merely to

take the property stolen, if there be no resistance, but to prevent or overcome resistance to the taking; and, in most cases, to operate upon or against the person of the one who is robbed. The affair at the hack, if all that Graham claims in regard to it be true, was, at most, larceny from the person, and not robbery, and the jury might well have found that it was only larceny. The court should not only have given the substance of the instruction asked, and which we have quoted, but it should have modified the charge given so as to express the law as we have stated it. It cannot be said the failure of the court to instruct the jury correctly in regard to the affair at the hack was error without prejudice, for the reason that there was conflict in the testimony as to what occurred at the fence, and it cannot be known what the jury found the facts to be.

II. The appellant complains that the charge of the court authorized the jury to find him guilty as charged in the indictment, if the claims of the state in regard to what took place at either the hack or the fence was supported by the evidence. In that we think there was no error. While it is true that the state claimed that the crime of robbery was committed at the hack, and also at the fence, yet the two transactions were so closely connected, and partook so much of the nature of a single transaction, that it was proper to consider them together.

2. ——: acts which are parts of same transaction.

III. What we have said disposes of all the objections discussed by counsel for the appellant which need to be specially considered. The charge of the court, excepting in so far as it is in conflict with the conclusions we have stated, seems to be correct and warranted by the record. Some of the questions discussed are not liable to arise on another trial.

For the errors indicated the judgment of the district court is REVERSED.

# B. R. FOUCHE, Appellant, v. F. O. DELK, Appellee.

**Mortgage**: PAYMENT: MERGER. Where one in consideration of a conveyance of real estate assumed the payment of a mortgage thereon, and afterwards upon making payment of the mortgage indebtedness took an assignment of the mortgage to himself, *held*, that the lien of the mortgage was merged in the legal title, and that a judgment against the mortgagor, rendered subsequent to the mortgage, was a superior lien to that of the mortgage in the hands of such assignee.

*Appeal from Decatur District Court.*—HON. JOHN W. HARVEY, Judge.

WEDNESDAY, JUNE 3, 1891.

ACTION to subject real estate to the payment of certain judgments. From the judgment as entered the plaintiff appeals.—*Reversed.*

*Marion F. Stockey* and *W. B. Tallman*, for appellant.

*S. A. Gates* and *Samuel Torrey*, for appellee.

GRANGER, J.—John Delk was in May, 1879, a resident of Decatur county, the head of a family, and the owner of seventy acres of land, described as "north thirty acres of northwest quarter of northeast quarter of section 4, and the northeast quarter of the northwest quarter of said section 4, township 69, range 25." The thirty acres in the northwest quarter of the northeast quarter, and ten acres off of the east side of the northeast quarter of the northwest quarter, constituted the homestead of John Delk. In 1877, John Delk and his wife made to one G. A. Hamilton a mortgage on all of said land to secure the sum of one thousand dollars. In May and June, 1879, the plaintiff obtained against

John Delk, in the district court of Clarke county, two judgments in the aggregate amount of two hundred and sixty-five dollars and ninety-two cents, and in the same months he filed duly certified transcripts of the same in the office of the clerk of the district court of Decatur county. The defendant is a son of John Delk; and in May, 1882, John Delk and his wife conveyed to the defendant all the land described, and made therefor two separate deeds, in one of which the homestead was conveyed and in the other the west thirty acres of the northeast quarter of the northwest quarter. The considerations expressed in the deeds are as follows: That in the one conveying the homestead being: "We deed said land as our homestead for the purpose of having the said Ferdinandus O. Delk provide us a comfortable home and living during the remainder of our lives; and it is expressly agreed that in case Ferdinandus O. Delk shall fail, neglect, or refuse to provide us a comfortable home and living the balance of our lives, then this deed to be null and void, and no title to pass from us." That in the other deed being: "Said consideration to consist in the said Ferdinandus O. Delk assuming and paying to George Hamilton, his executor or assigns, a certain mortgage executed to him by us on said thirty acres of land for one thousand dollars, together with all interest accrued thereon, fully relieving us from all liability by reason of said mortgage." John Delk and wife both died before the commencement of this action,—the latter in 1886, and the former in 1888; but were after the execution of the deed duly provided for by the defendant. The defendant afterwards paid to Hamilton the amount of his note and mortgage, and took an assignment as follows:

"For value received I assign the attached note and mortgage to Ferdinandus O. Delk, without recourse on me, this twelfth day of December, 1882.

"G. A. HAMILTON."

To obtain the money for the payment of Hamilton a note and mortgage on the thirty-acre tract was made to one Green, and afterwards the Green mortgage was paid, and a mortgage for eight hundred dollars was made to the defendant Hurst for the money applied to the discharge of the Green mortgage; the Hurst mortgage being still in part unpaid. The principal contention in the case is as to the legal effect of the payment of the Hamilton note; it being the claim of the plaintiff that it extinguished the lien of the mortgage, and gave priority to his judgment as against the thirty acres, not a part of the homestead. The defendant's contention is that the lien of the Hamilton mortgage is not extinguished, but exists for his protection against the lien of the judgments. In the consideration of the case other facts urged by the defendant will be noticed to the extent that they are important.

The district court gave judgment whereby the Hamilton note and mortgage is made a first lien on the thirty acres, not of the homestead, for nineteen hundred and twenty dollars, and the lien of the plaintiff's judgments, inferior thereto. Viewing the facts of the case as indicated by the deeds, wherein it is expressed that the consideration for the conveyance of the homestead is the support of John Delk and wife, and that for the remaining thirty acres the payment of the Hamilton mortgage, which was a lien on the entire tract, and the solution of the question is not difficult. The present contention as to liens is only as to the thirty-acre tract, and the agreement as to the homestead is only incidentally involved. In the deed for the thirty acres it is expressed that the defendant Delk assumes the payment of the mortgage; and, as between him and John Delk, he became the obligor. The payment, under such a state of facts, would merge the lien of the mortgage in the legal title, and be no longer superior to the judgment lien. *Johnson v.*

*Walter*, 60 Iowa, 315; *Byington v. Fountain*, 61 Iowa, 512; *Goodyear v. Goodyear*, 72 Iowa, 329.

There is a claim in argument by the appellee that, although there were two deeds, they were both parts of the one transaction in which he took the homestead, and was to care for his father and mother; that he would not have taken one piece of land without the other; and that it was the intention of himself and father at the time that the Hamilton mortgage should be assigned to him, and remain as a prior lien on the premises, and that such intention should now prevail. We need not consider the objections to the testimony, by which facts are claimed to be established, nor the legal significance of the facts, if established, for the evidence comes far short of its purpose. The defendant does not in his testimony say that there was between himself and father a talk of that kind; nor does he say that there was such an understanding, or any language from which the understanding could be deduced. We do not find in the testimony a word that even remotely sustains the claim that the parties, when the deeds were executed, intended anything but an absolute payment and discharge of the mortgage lien by the defendant. Much is said in argument to the effect that the value of the land (the thirty acres) did not exceed nine hundred dollars; that John Delk was dealing with his son for his support; that the purpose was to release the homestead from the lien of the mortgage; and that it could only be done so as to protect the defendant, by having the mortgage assigned to him and the lien continued; and that it is reasonable to suppose the parties so intended. But it is unreasonable to suppose they so intended, and not only failed to use any language to indicate the intent, but, on the contrary, used language of a different import. The defendant assumed the burden of showing the facts otherwise than expressed in the deeds, and to do so he must show more than that

the facts, as he claims them, would be to his own interest. The facts are clearly expressed in the writings of the parties, and sustain the legal conclusion above announced. With the facts as we find them, we need not consider the authorities cited by appellee.

It follows that the plaintiff should have his decree, and that the judgment of the district court must be REVERSED.

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# ALBERT MUSCH, Appellee, v. PHILIP BURKHART, Appellant.

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| 83 | 301 |
| 103 | 230 |
| 83 | 301 |
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| 113 | 41 |
| 83 | 301 |
| 124 | 442 |

**Trespass**: DESTROYING TREES: TENANTS IN COMMON: INJUNCTION. Where a row of trees grown to the height of from thirty to sixty feet upon the boundary line between two adjoining tracts of land were used as a fence by stretching barbed wire along their trunks, and served to shelter the building and stock of the owner on the south side thereof, but rendered a strip of land four or five rods wide on the north side thereof unproductive, *held*, that the owners of the adjoining tracts were tenants in common as to said trees, and that the owner on the north side might be restrained by injunction from cutting the trees down.

*Appeal from Black Hawk District Court.*—HON. C. F. COUCH, Judge.

WEDNESDAY, JUNE 3, 1891.

ACTION in equity to enjoin the defendant from cutting down or otherwise interfering with certain trees. There was a trial by the court, and a decree in favor of the plaintiff. The defendant appeals. *Affirmed.*

*J. J. Tolerton*, for appellant.

*Mullan & Hoff*, for appellee.

ROBINSON, J.—The plaintiff owns the south half of the northwest quarter of section 16, in township 90

north, of range 13 west, in Black Hawk county, and occupies it as a place of residence for himself and family. His dwelling-house, barn and other buildings are on the land described, and near its northwest corner. The defendant owns the northwest quarter of the quarter section described, and the south boundary line of his land is the north boundary line of the west part of the land of the plaintiff. About twenty years before the commencement of this action one Jeffers, who then owned the land now owned by the plaintiff, planted along and on the north boundary line thereof, for a distance of about thirty rods, commencing at the northwest corner, a line of cottonwood trees. They have grown to a height of from thirty to sixty feet, and their trunks have a diameter, near the ground, of from one to two feet. The average space between them is about three feet. The plaintiff has attached barbed wires to the north side of the trees, thus making a wire fence. He claims that the fence is needed; that the trees are of great value to him as a wind break; that they afford valuable protection from storm and winter winds to his buildings and stock; and that the defendant has threatened to destroy the fence, and to cut down and remove the trees; and that unless restrained he will do so. The defendant claims that, by agreement with the plaintiff, a division of their common boundary line was made for the purpose of fencing, by which the plaintiff was to maintain a fence on the east half of the line, and the defendant on the remainder; that the trees described have thrown out roots, which extend for many feet in his land; that by reason of such roots, and the shade of the trees, a strip of his land four or five rods wide, north of the trees, has been rendered unproductive. He denies that the trees are of any value to the plaintiff; claims that he has a right to cut and remove them, for the reason that they are a damage to him, and for the further reason that the plaintiff has cut and taken away

some of those originally planted there, and he claims a right to do the same. He admits that he had threatened and fully intended to cut down those now standing.

The evidence shows that the trees are of value to the plaintiff, and that they damage the defendant; also that they stand on the common boundary line. They were planted before the defendant acquired title to the land he now owns. Under what agreement, if any, between the owners of the two tracts of land, they were planted, does not appear, although Jeffers and his grantees seemed to have cared for them as their own. They stand upon and draw sustenance from both tracts of land, and, in the absence of a showing to the contrary, it must be presumed that they are owned by the parties to this action as tenants in common. *Dubois v. Beaver*, 25 N. Y. 124; *Griffin v. Bixby*, 12 N. H. 456. When one tenant in common destroys the subject of the tenancy, he is liable to his co-tenant for the damages he thereby sustains. *Dubois v. Beaver*, *supra*. A court of equity will, by injunction, restrain one tenant in common, at the suit of another, from doing a serious injury to the common estate. 1 High on Injunctions, sec. 344. It is well settled that the commission of a trespass may be restrained by injunction. *Grant v. Crow*, 47 Iowa, 633; 2 Story on Equity Jurisprudence, secs. 928, 929.

It is said that an injunction will not be allowed to restrain the commission of a trespass where the recovery of damages in an action at law would be an adequate remedy for the injuries which would result from the trespass, if committed, and that, to authorize such an injunction, the injury threatened must be irreparable. It was said in *Wilson v. City of Mineral Point*, 39 Wis. 164, that "an injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when

the damages which may result therefrom cannot be measured by any certain pecuniary standard." It was further held in that case that the destruction of trees and shrubbery growing upon premises occupied as a home by the plaintiff would be, in a legal sense, an irreparable injury to him. In this case the plaintiff stated that the cutting down of the trees would damage him to the amount of two hundred dollars. But it does not follow that the damages would not be irreparable, within the meaning of the law, nor does it appear that the plaintiff is willing to suffer the damages for the sum named. The trees cannot be replaced, nor can their benefit to the plaintiff, and the comfort and satisfaction he derives from them, be accurately measured by a pecuniary standard. The use which the defendant purposes to make of them is not the one for which they were designed, nor the only one for which they are adapted. There are many cases where rights conflict, or where they are in dispute, in which courts of equity will not interfere by injunction to prevent an impending injury, so long as there is an adequate remedy at law for the injury threatened. But in this case there is no dispute as to the material facts involved, and the respective rights of the parties are known. The plaintiff has an interest in the trees for which he cannot be compelled, at the election of the defendant, to accept a money consideration. A person is not obliged to suffer his property to be destroyed at the will of another, even though he may be able to recover ample pecuniary compensation therefor. This is especially true of property like trees, planted for and adapted to a certain use, and serving a special purpose. Their owner has an interest in them which he may protect, and to be deprived of it without his consent would be to suffer irreparable injury, within the meaning of the law. It appears in this case that the plaintiff has cut down and appropriated a few of

the trees which at one time constituted a part of the line of trees in question, but the fact does not authorize the defendant to cut down and remove the remainder. The trees cause him some damage, but not sufficient to authorize him to destroy them. The decree of the district court enjoined the defendant "from tearing down or interfering with the fence on said line, and from in any manner interfering with said trees." This must be construed in connection with the injury threatened and the relief asked, to enjoin the defendant from destroying, or in any manner injuring the trees and fence. It was not designed to prevent him from taking care of the trees and maintaining the fence. His right to do so is as great as that of the plaintiff.

The decree of the district court is AFFIRMED.

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## SANDUSKY MACHINE & AGRICULTURAL WORKS, Appellant, v. JOHN HOOKS *et al.*, Appellees.

1. **Agency**: EVIDENCE. In an action upon a promissory note given for a cornsheller the defendants claimed that the sheller was sold to them by one L. as agent for the plaintiff, and pleaded a breach of the warranty made by L. The evidence showed that the sheller was sold by L. to the defendants, but there was no direct testimony to L.'s agency for the plaintiff, nor that L. assumed to be such agent, and the manager of plaintiff's business testified that L. was not its agent. *Held*, that the finding of the jury that L. was the agent of the plaintiff was not supported by the evidence. [ROBINSON, J., *dissenting*.]

2. **Practice in Supreme Court**: QUESTIONS CONSIDERED ON APPEAL. The defendants not having raised in the district court the question of the plaintiff's ratification of L's. contract of warranty by its acceptance of the note taken by him, *held*, that such question would not be considered in the supreme court upon appeal. [ROBINSON, J., *dissenting*.]

3. ———: ———. When cases are not argued on both sides in the supreme court only such question will be considered by the court as may be necessary to the disposition of the case.

*Appeal from Harrison District Court.*—HON. C. H. LEWIS, Judge.

THURSDAY, JUNE 4, 1891.

THIS is an action upon a promissory note. There was a judgment on a verdict for the defendants. The plaintiff appeals.—*Reversed.*

*S. J. King*, for appellant.

*Joe H. Smith*, for appellees.

BECK, C. J.—I. The answer of the defendants to the plaintiff's petition alleges that the note was given for a cornsheller purchased by defendants from the plaintiff through one Luce, acting as the plaintiff's agent; that Luce warranted the machine to do good work, and that it would operate well with a certain horse-power owned by the defendant; that the sheller did not comply with the terms of the warranty; and that the defendants paid the note to Luce, who was at the time of payment the agent of the plaintiff. Other allegations of the answer need not be here recited. The cause was submitted to the jury upon the issues presented by the defenses pleaded by the answer as just stated. The jury, in response to questions submitted to them, found that Luce was the agent of the plaintiff, and made the warranties stated in the defendant's answer. Upon these special findings, and a general verdict in their favor, judgment was rendered for the defendants. A motion for a new trial on the ground, among others, that the special findings and general verdict of the jury are not supported by the evidence, was overruled.

1. AGENCY: evidence.

II. We think the court should have sustained the motion for a new trial, for the reason that there was

2. PRACTICE in supreme court: questions considered on appeal.

absolutely no evidence whatever tending to show that Luce, as the agent of the plaintiff, sold the sheller to the defendants, no one testifying that he was the plaintiff's agent. It is shown that he sold the sheller to the defendants, but no witness professed to have any knowledge authorizing him to say that Luce was or acted as the plaintiff's agent when he sold the sheller. It is not shown that he assumed to be the plaintiff's agent. One witness testified in the following language: "After looking through some of his catalogues, etc., he told us he could sell us a sheller. He was not agent for any sheller except the Sandusky sheller. He says, 'I have never seen one of them in the country.'" This evidence is not competent to establish, as against the plaintiff, agency in Luce. On the contrary, the plaintiff's officer managing its business at the time testifies that Luce was not the plaintiff's agent, but that the plaintiff sold the sheller to Luce. The verdict of the jury is plainly without the support of any evidence. The district court erred in not sustaining the motion for a new trial.

III. The case was tried on the issues involving the agency of Luce, and the contract of warranty made by him upon selling the machine. The question of ratification by the plaintiff of Luce's contract of warranty, by its acceptance of the note given by the defendants for the machine, was in no way presented in the court below, by pleadings, instructions, or otherwise. It cannot be considered in this court. It follows that *Eadie v. Ashbaugh*, 44 Iowa, 519, and *Farrar v. Peterson*, 52 Iowa, 420, in which the doctrine of ratification is considered, have no application to this case. The defendants based their defense in the court below on the grounds that Luce was the agent of the plaintiff, and, as such, warranted the machine. The evidence utterly fails to show agency in Luce. Therefore, the defendants cannot recover on

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the grounds of the agency of Luce and the warranty by him. They cannot in this court change the defense, and base it upon the ratification of the note by the plaintiff, implied by the acceptance of the note. The same case must be reviewed upon this appeal which was made in the court below. See *Garland v. Wholebau*, 20 Iowa, 271, and cases cited in 1 McClain's Digest, p. 48, sec. 145, *et seq.*

IV. Other questions in the case are not considered, for the reason that it does not appear that they will necessarily arise upon another trial; and for another reason these questions ought not to be considered. We have no arguments for the defendants. When cases are not argued on both sides, we consider only such questions as are necessary for their disposition. If the case may be disposed of on a single point, we discuss no others, for the reason that rulings ought not to be made, further than is absolutely necessary, upon questions not fully discussed.

The judgment of the district court is REVERSED.

ROBINSON, J. (*dissenting*).—The second division of the answer alleges that the promissory note in suit was given by the defendants for a cornsheller which was sold by the plaintiff to defendants; that, as a part of the transaction, the sheller was warranted to operate well, and to do good work, with a horsepower then owned by the defendants; that the sheller delivered was not as contracted for; that it could not be used with the horsepower of the defendants, nor with any other power; that it wholly failed to comply with the warranty; that when such failure was ascertained the sheller was returned to the agent of the plaintiff, and has never since that time been in the custody nor under the control of the defendants. Three notes were given for the sheller, two of which have been paid, and the third is the one in suit. The evidence as to the war-

ranty, and the breach thereof, and the return of the sheller, fully sustained the findings of the jury, and on the merits of the case the defendants should succeed. If the judgment of the district court is reversed, it must be on purely technical grounds.

The defendants made no attempt to show that the man of whom they purchased (Luce) was in fact the agent of the plaintiff, but endeavored to show that he acted as such in making the sale. The evidence as to the agency of Luce, on the part of the defendants, is meager, but, in my judgment, it was sufficient to authorize the jury to find that in what he said and did to effect the sale he claimed to act as the agent of the plaintiff. When the defendants applied to him for a sheller, he informed them that he "was not agent for any sheller except the Sandusky sheller." When the notes were taken for the sheller, Luce took them, and told the defendants it was "the first machine he had sold for that company, and he wanted to have the notes made out and fix the business up." The notes were made payable to the plaintiff. The first two notes were collected by Luce. There is no evidence which shows, or tends to show, that, at the time of the transaction the defendants knew that Luce was not the agent of the plaintiff. While the evidence stated would not alone be sufficient to establish an agency as against the plaintiff, yet the defendants were justified in believing that Luce acted as agent for it. That being the case, when the plaintiff seeks to enforce the collection of the note with knowledge of the fact, it brings itself within the rule of the *Ashbaugh* and *Peterson cases* cited in the opinion of the majority. The plaintiff is a party to the note, and is not an innocent holder. That is the well-established rule, which was explicitly recognized in the *Peterson case*. The answer pleads a failure of consideration, and the evidence sustains the plea. The plaintiff took the note

charged with knowledge of the fact that it was without consideration, and the defense set up is good as to it, even though the question of agency be eliminated from the case. *Aldrich v. Stockwell*, 9 Allen, 45. But, by seeking to enforce the collection of the note with actual knowledge of the facts, the plaintiff ratified the acts of Luce, and made him its agent. In the *Ashbaugh case*, 44 Iowa, 420, it is said that "the general rule is that the act of the agent is treated throughout as if it were originally authorized by the principal, for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy. Hence it is, if the agent has made a contract without authority, and it is afterwards ratified, the principal may be sued thereon in the same manner and with the same effect as if he had originally given the authority." That statement of the law is fully sustained by the authorities. Mechem on Agency, sec. 178; Story on Agency, secs. 244, 250. The rule was applied in the *Peterson case*, 52 Iowa, 420, where the answer was, in legal effect, the same as that in this case; ratification not being pleaded; the allegations of the answer being that the agreement was made with the principal, although in fact it was made by one who acted as agent without authority. But, even if it would have been better practice to plead the ratification, the failure to do so was not material in this case; for the plaintiff knew before the trial commenced that the agreement relied upon was made with a person claimed to have acted as agent. Section 2686 of the Code provides that "no variance between the allegations in the pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." It is clear that there was no prejudice in this case. Moreover, the objection that there was a variance is not raised by the appellant, and it nowhere claims that

it was necessary to plead the ratification of the acts of Luce in order to recover upon them. It may be that the special finding as to the agency is not sustained by the evidence, but that fact is not material, for the reason that it might have been in either the affirmative or negative, without in any manner affecting the general verdict, for the reason that it ignored the effect of a ratification and the failure of consideration. As a general rule, to which this case is no exception, a party, in order to succeed, is not obliged to prove all he has pleaded, but only enough to establish a cause of action or defense, within the averments of his pleading. I do not understand that there has been any change in the defense in this court. The defendants have not appeared, relying, perhaps, upon the *Ashbaugh* and *Peterson cases* as affording them ample protection. The defense interposed in the district court was a failure of consideration, and it was there sustained. I am of the opinion that it should be sustained here.

# REPORTS

OF

# CASES AT LAW AND IN EQUITY,

DETERMINED BY THE

# SUPREME COURT

OF

# THE STATE OF IOWA,

AT

## DES MOINES, OCTOBER TERM, A. D. 1891,

AND IN THE FORTY-FIFTH YEAR OF THE STATE.

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## MAX J. BAEHR, Appellee, v. A. A. CLARK, Appellant.

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**Sale**: PURCHASE FROM BAILEE: TITLE. In an action of replevin to recover certain diamonds it appeared that the defendant was an innocent purchaser thereof for value from one B., who represented that he was the owner of the same, but who in fact had obtained possession of them from the plaintiff under the representation that he had a customer for the same, and was permitted to take them from the plaintiff's store under promise that he would return with the diamonds or the price in about an hour. *Held*, that the defendant obtained no title by his purchase, and that the plaintiff was entitled to recover.

*Appeal from Pottawattamie District Court.*—HON. A. B. THORNELL, Judge.

MONDAY, OCTOBER 5, 1891.

ACTION of replevin for a diamond ring and a diamond stud. The plaintiff and the defendant each claim to be the owner of said property. The cause was submitted to a jury, and, the jury being unable to agree upon a verdict, by agreement of the parties the issue was afterwards submitted to the court without a jury, on the evidence taken by the short-hand reporter at the jury trial. The court, upon an examination of the evidence, found for the plaintiff. The defendant appeals.—*Affirmed.*

*Flickinger Bros.*, for appellant.

*Chas. Ogden* and *Wright, Baldwin & Haldane*, for appellee.

ROTHROCK, J.—I. The court made special findings of the facts which it was thought were established by the evidence. We need not set out these findings in detail, but will recite such as are deemed material to a determination of the rights of the parties upon an appeal.

The plaintiff is a dealer in diamonds at the city of Omaha, in the state of Nebraska. In the month of December, 1888, one J. J. Barker made his appearance at the plaintiff's place of business, and represented that he had a customer for a diamond ring and stud, and desired to examine the plaintiff's goods. He selected the ring and stud now in controversy, and the plaintiff delivered them to him to take them and show them to the party who desired to make the purchase. The sum of four hundred and fifty dollars was fixed as the price of the diamonds, and Barker was to return them, or return with the price, in an hour. The plaintiff saw no more of Barker for two or three days, when he succeeded in having an interview. Barker at first stated that he had been robbed of the diamonds; said he had

been knocked down and robbed, and called attention to certain bruises on his face and marks on his fingers. The plaintiff threatened to have Barker arrested, and then he stated he had lost the diamonds at a gambling house; and afterwards he stated that they were in possession of the defendant Clark at Council Bluffs. It was afterwards ascertained that Barker, after obtaining possession of the diamonds, crossed the Missouri river to Council Bluffs, and stopped at a gambling house kept by one Carrigg. While there he was in urgent need of money, and Carrigg advanced money to him, from time to time, and took and held the diamonds as security. When these advancements amounted to the sum of two hundred and forty-seven dollars Carrigg refused to make further advancements, and he and Barker went to the defendant with the diamonds, and sold them to him for the sum of two hundred and seventy-five dollars, and Clark paid Carrigg, the keeper of the gambling house, the sum of two hundred and forty-seven dollars, and he paid Barker the balance, being twenty-eight dollars. Barker represented to the defendant that the diamonds belonged to him. There are other facts disclosed in evidence as to efforts made by the plaintiff to obtain payment for the property, and offers to purchase the diamonds from Clark, which are of no importance in the case. The plaintiff did no act which would in law estop him from asserting any claim he may have had at any time to recover the property from Clark. The court found that Clark was an innocent purchaser for value, and we are inclined to think that finding was correct.

The only real question in the case is whether Clark is entitled to the property as an innocent purchaser. Other facts might be stated which authorize the conclusion that Barker obtained the possession of the goods by fraudulent representations, but enough has been stated to show that the court was fully authorized in finding

that Barker had no customer for valuable diamonds. The fact that he did not return in an hour, but repaired to a gambling house, and pledged the diamonds to the keeper of the house, fully warrants the finding that he obtained possession of the property by fraud. If the plaintiff had sold and delivered the diamonds to Barker upon these representations, and Barker had resold to the defendant, he being an innocent purchaser, the plaintiff could not maintain this action. It is well settled that when goods are obtained from their owner by fraud, and the facts show a sale to the party guilty of the fraud, an innocent purchaser of the goods from the fraudulent vendee for value, and without notice of the fraud, will take the title. The true inquiry is, did the owner intend to transfer both the property in and possession of the goods to the person guilty of the fraud? If he did, there is a contract of sale, however fraudulent the device, and the property passes, and subsequent innocent purchasers for value will be protected. *Rowley v. Bigelow*, 12 Pick. 312; *Perkins v. Anderson*, 65 Iowa, 398; 1 Parsons on Contracts, 520. And see *Oswego Starch Co. v. Lendrum*, 57 Iowa, 573, in which the rule announced is recognized, but held not applicable to an attaching creditor of the fraudulent vendee. *Robinson v. Pogue*, 86 Ala. 257; 5 S. Rep. 685; *Hutchinson v. Watkins*, 17 Iowa, 475; *Chicago Dock Co. v. Foster*, 48 Ill. 507. But this rule has no application unless there is an actual sale of the property by the alleged vendor. If one delivers property to another as a mere bailee, a purchaser from the bailee acquires no title, however innocent he may be. He has no more right to assert title to the property than if it had been stolen, and his purchase had been from the thief. The principle upon which this distinction rests is that the vendor in the cases last supposed does not part with the title to the property, nor does he have any such intention, and the fraudulent

possessor of the property can convey no title to any third person, however innocent; for no property has passed from himself to the true owner. Benjamin on Sales, 369; *Rohrbough v. Leopold*, 4 S. W. Rep. (Tex.) 460; *Church v. Mellville*, 21 Pac. Rep. (Or.) 387.

It is very plain that the transaction between the plaintiff and Barker did not pass the title of the diamonds to Barker. He did not pretend or claim that he wanted to purchase diamonds. He was intrusted with the possession of them merely as the agent of the plaintiff; and, instead of returning them, he embezzled them by pawning them in a gambling house, and by subsequently, in connection with the keeper of the house, selling them to the defendant. The authorities appear to be uniform that in such case the purchaser from a mere agent or bailee acquires no title, even though he pay value and has no notice of the embezzlement, and that the rule *caveat emptor* applies. It is idle to contend that Barker did not have the criminal intent to embezzle the diamonds when he obtained possession of them from the plaintiff. There is no evidence that he had any friend who was in need of diamonds. All of his acts subsequent to the time he acquired possession indicate that his purpose, from the inception of his enterprise, was not to procure a purchaser for the property, but to appropriate it to his own use. There are no other questions in the case which demand consideration.

The judgment of the district court is AFFIRMED.

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## THE STATE OF IOWA, Appellee, v. GEO. W. POTTS, Appellant.

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1. **Perjury**; EVIDENCE: COMPETENCY: ERROR WITHOUT PREJUDICE. The defendant was indicted for the crime of perjury alleged to have been committed by him in a case wherein he was on trial for the crime of receiving a bribe. In his capacity of constable the defendant had

seized certain intoxicating liquors, and it was claimed that he, and another constable acting with him, agreed with the owner to obtain the release of the liquors in consideration of the payment of one hundred dollars. The liquors were released upon the recommendation of one or the other of the officers, and the money, it was alleged, was paid to the constable acting with the defendant in bills of the denominations of fifty, twenty and ten dollars. Before the payment of the money the bills were marked by the owner of the liquors, and a memorandum describing the bills, and the marks upon them, was made. Within a few hours after the payment both officers were arrested and searched, and a fifty-dollar bill found upon the defendant, and bills of the other denominations were found upon the other constable. A memorandum of the bills so found was made by the justice before whom the constables were searched, and that justice and another together made a second memorandum. The witnesses who made the above memoranda testified positively to the correspondence of the same with the money found upon the defendant, and this the defendant, testifying in his own behalf, did not deny, but claimed that the bill found upon him had been received from a bank some days prior to his arrest. *Held*, that while the memoranda were not competent as original evidence, their introduction could not have been prejudicial to the defendant.

2. **Practice**: ARGUMENT TO JURY: MISCONDUCT OF ATTORNEY: ERROR WITHOUT PREJUDICE. An attorney for the state in his closing argument used certain bills by way of illustration, apparently in reply to some claim made by defendant's attorney in regard to the numbering on the bills. *Held*, that as the action and argument of the attorney did not relate to any material issue, they could not be regarded as sufficiently prejudicial to warrant a reversal of the judgment.

3. ———: INSTRUCTIONS TO JURY. Where the jury are instructed that the law of the case is not embodied in any one instruction, and that they must consider and construe the instructions together, the fact that the law in regard to a given proposition involved in the case was not fully stated in a single paragraph will not be deemed prejudicial.

4. **New Trial**: NEWLY DISCOVERED EVIDENCE. A new trial will not be granted in a criminal case because of the affidavit of one of the witnesses for the prosecution that he was mistaken in his testimony given upon the trial, when such testimony was rebutted by witnesses testifying in behalf of the defendant, and does not pertain to a material issue in the case.

*Appeal from Warren District Court.*—HON. A. W. WILKINSON, Judge.

WEDNESDAY, OCTOBER 7, 1891.

THE defendant was convicted of the crime of perjury and adjudged to be imprisoned in the penitentiary at Ft. Madison at hard labor for a term of three years. He appeals.—*Affirmed.*

*Spurrier, Coffin & Dowell* and *C. C. Cole,* for appellant.

*John Y. Stone,* Attorney General, for the State.

ROBINSON, J.—The alleged perjury of the defendant was committed in a case in which he was on trial accused of the crime of receiving a bribe. It is claimed by the state that the facts in regard to his accepting a bribe, so far as they are relevant to the issues in this case, are substantially as follows: "On the fourth day of February, 1888, the defendant was a constable duly qualified and acting in and for Saylor township, in Polk county. On that day he had in his possession a quantity of intoxicating liquors alleged to be of the value of five thousand dollars, which were owned by John Connelly. The defendant had seized and taken possession of the liquors by virtue of a search-warrant issued on the information of one West, which charged that the liquors were kept for sale in violation of law. Acting with another constable named Hamilton, he agreed, for the consideration of one hundred dollars, to procure the release of the liquors without a trial. In order to procure such release, the defendant had several conferences with the county attorney of Polk county, W. W. Phillips, advising him that there was not sufficient evidence to justify further prosecution of the proceedings against the liquors, and urging that they be dismissed, and that the liquors be released. The advice of the defendant was taken, the proceedings were dismissed, and the liquors were released, the defendant and Hamilton receiving one hundred dollars for their

part in the transaction. The county attorney had suspected the integrity of the officers, and the negotiations between them and Connelly were carried on with his knowledge, if not under his direction. The money paid by Connelly was marked, and included one fifty-dollar bill, two bills for twenty dollars each and one for ten dollars. It was in fact paid to Hamilton. Both the men were arrested and searched within a few hours after the money was paid, and the fifty-dollar bill was found on the defendant, and the other bills were found on Hamilton. The defendant was indicted for receiving a bribe, and in the course of the trial voluntarily offered himself as a witness in his own behalf, and, after being duly sworn, testified in substance and effect, that he was not in the office of the county attorney on the day in question; that he had no conversation with the county attorney in regard to dismissing the search-warrant proceedings, and that he obtained the fifty-dollar bill from the Capital City Bank on the twenty-fourth or twenty-fifth day of the January preceding his arrest. The giving of that testimony constitutes the perjury of which the defendant was convicted in the district court.

I. A few minutes before the bills were paid to Hamilton, a memorandum, containing a brief description of each, was prepared, at the instance of Mr. Connelly, and signed by him as a means of identification. The justice before whom the defendant and Hamilton were searched made a similar memorandum of the bills found, and that justice and another together made a third memorandum of a similar character. On the trial the bills were not introduced in evidence, but the memoranda were, and of that appellant complains. It was necessary for the state, in order to establish the guilt of the defendant, to show that the fifty-dollar bill paid by Connelly to Hamilton was the identical fifty-dollar bill found on the person of Potts. It is con-

1. PERJURY: evidence: competency: error without prejudice.

ceded that a bill of that denomination was found on the defendant; therefore, the existence of the bill was not in issue. The defendant states that it would be impossible for him to give a description of it; hence, its numbers, markings and contents were not in issue. Under these circumstances, it was not necessary to introduce the bill in evidence. It was only necessary for the witnesses to be able to state that the bill which they examined, and of which they wrote or saw a description, was the one found on the person of the defendant. They might know it was the same by some peculiarity of number or stain or puncture, or other means which satisfied them of its identity. But we do not understand the theory on which the memoranda were received in evidence. They were proper as a means of refreshing the recollections of the witnesses who made them, or had compared them with the bills they described, but they were not competent as original evidence. Witnesses testified to making the memorandum which was prepared before the money was paid to Hamilton, and to comparing it with the bills found on Hamilton and the defendant, and they testified positively that the bills were the same. It is clear that they knew them to be the same in part because the markings on the bills were the same as those indicated in the memorandum. The memoranda prepared by the justices tended to show that the bills found on the constables were the same as those marked at the instance of Connelly. The testimony of the witnesses for the state as to the identity of the bills was direct and positive before the memoranda were introduced, and was largely based upon them. The defendant did not deny that the bills in question were of the description, and marked as claimed on the part of the state, but only insisted that the bill taken from him had been paid by the bank named. Under these

circumstances, the introduction in evidence of the memoranda could not have been prejudicial.

II. The appellant complains of the action of the court in permitting an attorney for the state, in his closing argument, to use certain bills by way of illustration. The correctness of the ruling of the court is at best doubtful. But it appears from the statements made by the attorney that he was answering some claim made by an attorney for the defendant in regard to the numbering on the bills. What that claim was, or what was said or done by the defendant's attorney in support of it, is not shown by the record. The acts and argument complained of did not relate to any material issue in the case. There is nothing to indicate that they might have been prejudicial, and we should not be justified in disturbing the judgment on account of them.

2. PRACTICE: argument to jury: misconduct of attorney: error without prejudice.

III. Complaint is made of certain portions of the charge of the court. We think the jury could not have been misled because the law in regard to a given proposition was not fully stated in a single paragraph. They were told that the law of the case was not embodied in any one instruction, and that they must consider and construe them all together. We think they were not prejudicial to the defendant.

3. ——: instructions to jury.

IV. During the trial of the cause the defendant testified that, although he did not enter the office of the county attorney on the day he is claimed to have done so to secure a dismissal of the search-warrant proceedings, he went to the door, and looked through the letter-hole therein, and saw the county attorney and a man named McCormick at the table, and that they had money on it. The state introduced several witnesses in rebuttal, who testified that a person looking through the letter-hole could not have seen into the room to the height of the table, and in effect that he could not have seen money on the

4. NEW TRIAL: newly discovered evidence.

table, nor the faces of persons seated by it. In support of his motion for a new trial defendant introduced the affidavit of one of the witnesses who had so testified, which stated, in effect, that after his testimony had been given he examined the letter-hole, and found that his testimony was not correct. Other affidavits were introduced which tended very strongly to show that a person looking through the letter-hole could readily see the top of the table, and the faces of persons sitting in the room. On the trial the defendant had introduced witnesses who testified, in effect, to the same facts. It will thus be seen that the defendant asked a new trial on the ground of newly discovered evidence, the most of which is cumulative in its nature, and all of which relates to a collateral matter, and not to material issues. It is well settled that a new trial cannot be granted in a criminal case on that ground. *State v. Whitmer*, 77 Iowa, 560, and cases therein cited. The discovery of a mistake in the testimony of a witness did not authorize a new trial on that ground.

We discover no error in the record which would authorize us to disturb the judgment of the district court. It is, therefore, AFFIRMED.

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## J. J. SCHLAWIG, Appellee, v. MARIANA DE PEYSTER *et al.*, Appellants.

1. **Original Notice:** SUBSTITUTED SERVICE: RESIDENCE: VOID JUDGMENT. Where, in an action for the foreclosure of a mortgage, service of the original notice was made upon the defendant mortgagor by delivering a copy thereof to his wife at the place where she and the defendant's children resided in this state, but the mortgagor had about eighteen months previously gone to another state, intending to make his home there, and there engaged in business, built a house, shop, and other buildings, voted at elections, sat upon juries and discharged other duties of a citizen, but did not remove his family there for several years, though continually intending to do so, and visited them in this state at long intervals, *held*, that a decree of foreclosure based upon such service was void for want of jurisdiction.

2. **Practice in Supreme Court:** APPEAL: REVIEW. Where a cause is pending in the supreme court upon the appeal of one of the parties thereto, the amount of the judgment therein will not be reviewed upon the complaint of one who has not appealed therefrom.

3. **Decree:** PERFORMANCE: EXTENSION OF TIME ON APPEAL. Where in an action to redeem from a judicial sale the plaintiff was awarded the right of redemption if made within ninety days after the rendering of the decree, but redemption within such time was prevented by the appeal of the defendant to the supreme court, *held*, that the plaintiff was entitled to ninety days after the affirmance of the judgment in the supreme court in which to redeem.

*Appeal from Plymouth District Court.*—HON. SCOTT M. LADD, Judge.

WEDNESDAY, OCTOBER 7, 1891.

ACTION in chancery to redeem certain lands from a mortgage and from a sheriff's sale under a foreclosure of the mortgage for interest. There was a decree, upon a trial on the merits, granting the relief prayed for in the plaintiff's petition. The defendants appeal. *Affirmed.*

*S. M. Marsh* and *T. G. Henderson*, for appellants.

*O. C. Treadway* and *Argo, McDuffie & Argo*, for appellee.

BECK, C. J.—I. The plaintiff executed a mortgage to the defendant De Peyster to secure the payment of six hundred dollars and interest payable upon maturity of certain notes given therefor. Upon the maturity and non-payment of interest, an action to foreclose the mortgage was instituted, and a decree of foreclosure was rendered, and a sale of the land thereon was for the amount of the judgment for interest, with attorney's fees and costs. The plaintiff seeks in this action to redeem from the sale and mortgage, basing his right on the ground, among others, that the decree of

1. ORIGINAL notice: substituted service: residence: void judgment.

foreclosure is void, for the reason that the original notice in the case was not served upon him as required by law. The service was made by copy delivered to a member of his family (his wife) at his alleged usual place of residence in this state. The plaintiff alleges that his usual place of residence at the time of service was in the Black Hills, Dakota, and not in Iowa, and insists, therefore, that the decree is void for want of jurisdiction of his person.

II. The record very satisfactorily shows that about eighteen months before the service of the notice the defendant, who then lived with his family in Sioux City, went to the Black Hills, intending to make his home there. He left his family consisting of a wife and children, in Sioux City, intending to remove them to the Black Hills as soon as he could do so. He engaged in mining and other business in the Black Hills, and built a house, shop and other buildings there. He voted at the elections and sat upon juries and discharged other duties of a citizen, but did not remove his family there, though continually intending so to do. He visited his family about two years after he went to the Black Hills, and repeated the visit at long intervals. He never abandoned his purpose of removing his family to Dakota. He seems to have done no act indicating that he regarded Iowa as the place of his residence. We think that actual residence, with the purpose and intent that it is legal and shall be permanent, fixes the legal residence contemplated by the statute providing for service of original notices of actions by a copy delivered to a member of the defendant's family at his usual place of residence, without regard to the place of residence of his family. We know of no rule which fixes absolutely a man's residence at the place of residence of his wife and family. A presumption may arise that his residence is with his family, but that presumption may be overcome by

evidence showing the fact to be otherwise. Such presumption is in this way overcome by the evidence in this case. In support of these views, see the following cases: *Cohen v. Daniels*, 25 Iowa, 88; *Vanderpool v. O'Hanlon*, 53 Iowa, 246; *Ringgold v. Barley*, 5 Md. 186; *Gilman v. Gilman*, 52 Me. 165; *Hairston v. Hairston*, 27 Miss. 704. *Love v. Cherry*, 24 Iowa, 204, cited by counsel for the defendant, is not in conflict with our conclusions in this case. Because of absence of intention to make the residence in question permanent, and a continual purpose to return to a prior place of residence, it was held in that case that at such prior place of residence service of notice could be lawfully made by copy upon a member of the defendant's family. In this case there was a fixed and constant purpose to remove the plaintiff's family to the Black Hills, which was all the time regarded by him as the permanent place of residence and home of the plaintiff. This purpose was never relinquished or changed, and there is no evidence showing facts in conflict therewith. It is our conclusion that the decree of foreclosure is void for want of jurisdiction of the person of plaintiff, and for this reason he may redeem from the sale and mortgage.

III. Plaintiff complains of the amount which he is required by the decree to pay in order to make the redemption. We think the evidence well supports the correctness of the decree in this regard. Besides, as the plaintiff did not appeal, he is not in a condition to complain of the decree, and ask that it be reversed or changed in this court.

2. PRACTICE IN SUPREME COURT: APPEAL: REVIEW.

IV. By the decree of the court below the plaintiff had ninety days from the rendition thereof in which to make redemption. That time has expired pending the appeal which prevented performance by the plaintiff. The time for redemption ought to be extended for

8. DECREE: PERFORMANCE: EXTENSION OF TIME ON APPEAL.

ninety days after the entering of final decree and judgment upon this appeal. The decree of the district court is affirmed, with the modification just suggested, that the plaintiff have ninety days in which to redeem.

A decree to that effect will be entered in this court.

AFFIRMED.

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## JOHN H. MORRIS, Appellee, v. H. B. GRIFFIN, Appellant.

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**Partnership:** ACCOUNTING: COMPENSATION OF PARTNER FOR SERVICES TO THE FIRM. The plaintiff and the defendant being engaged as copartners in the business of selling agricultural implements, the plaintiff entered the employment of another firm, on a salary, to which he gave his entire time, save about three months of the year, which he devoted to the business of the partnership. The plaintiff's salary was not contributed to the firm, but it was agreed, in contemplation that the plaintiff's employment would be for but one year, that the defendant should give his entire time to the firm business without compensation. Without further agreement the business of the firm was continued for more than eleven years, during which time the plaintiff continued his outside employment. *Held*, upon an accounting between the partners that the defendant was entitled to have the reasonable value of his services for nine months of each year, during the years of the plaintiff's outside employment, credited against his indebtedness to the firm.

*Appeal from Jackson District Court.*—HON. A. HOWAT, Judge.

THURSDAY, OCTOBER 8, 1891.

ACTION in equity to wind up a partnership between the plaintiff and the defendant under the firm-name of Morris & Griffin, and for an accounting between the partners. The case was tried to the court, and a decree entered finding that the plaintiff is indebted to the firm in the sum of four hundred and fifty-eight dollars and seventy-four cents, after receiving all credits, and that the defendant is indebted to the firm in the sum of four-

teen thousand, five hundred and eighty-nine dollars and twenty-five cents, after receiving all credits. Judgment was entered accordingly, from which the defendant appeals.—*Modified and affirmed.*

*D. A. Fletcher*, *D. A. Wynkoop* and *L. A. Ellis*, for appellant.

*G. L. Johnson* and *Bills & Haas*, for appellee.

GIVEN, J.—I. In 1868 these parties entered into a copartnership in buying and selling agricultural implements at Maquoketa, Iowa, which continued till the commencement of this suit, May 17, 1888. Prior to forming this partnership the plaintiff was engaged in selling implements on commission at Maquoketa, and the defendant was farming. For the first eleven years and some months of the partnership the plaintiff was in the employment of D. M. Osborn & Co., of Cleveland, Ohio, as a salesman, at a salary of fifteen hundred dollars per year for the first three months of his employment, and eighteen hundred dollars a year for the remainder of the time. This employment required his entire time and absence from Maquoketa, except for about three months in each year, which months he devoted to assisting the defendant in the business of the partnership. The affairs of the partnership were managed and controlled by the defendant during these eleven years, he giving his entire time to the business. No books of accounts were kept during the first several years of the partnership, and the books thereafter kept do not show the true state of the accounts between the partners; very many items being erroneously or indefinitely entered, and many others entirely omitted. Each party has caused the accounts to be examined by persons claimed to be competent accountants, and exhibits schedules which he claims present the true state of the accounts. If the case had been referred,

and was for hearing on exceptions to the report, the investigation would be much simplified, and the result more satisfactory. There being no such report, and no finding of facts by the court, we have found it necessary to investigate the entire accounts as claimed in these schedules. While there is no contention as to many items, the number disputed is so numerous that it would be impracticable, within the limits of an opinion, to give our reasons for allowing or disallowing each. While we have examined each item with care, it will be sufficient that we state, in general terms, the result of our examination. We realize that out of this chaos it is impossible to reach the exact state of the accounts, but, as this results from the neglect of the parties in not keeping proper accounts, they must be contented with the best results attainable from the *data* furnished.

II. In the absence of a report by the referee, or of findings of facts by the court, we have taken the schedules presented by each party as the basis of our investigation. Upon investigating each disputed item in the schedules, and allowing or disallowing the same, we reach results substantially the same as those announced in the decree; that is, that the plaintiff is indebted to the firm in the sum of four hundred and fifty-eight dollars and seventy-four cents, after receiving all credits to which he is entitled, and that the defendant is indebted to the firm, after receiving all credits, in the sum of fourteen thousand, five hundred and eighty-nine dollars and twenty-five cents, subject only to the question of his right to be further credited on account of services for managing the business of the firm.

III. The defendant claims to be entitled to one thousand dollars per year for the first eleven years and seven months of the partnership for services in managing the business of the firm. In view of the importance and nature of this claim we deem it necessary to notice it specifically, and we now inquire whether the

defendant is entitled to credit upon the amount we have found against him on this account. The plaintiff claims that the contract of copartnership was made in view of his employment with Osborn & Co., and that one of the conditions was that the defendant would give his time to the business of the firm without charge, in consideration of the business that the plaintiff had theretofore established at Maquoketa. The plaintiff and one witness so testified, and the defendant testified that no such agreement was made. We are satisfied from the testimony that the partnership was contracted and transacting business prior to the time when the plaintiff entered the employment of Osborn & Co., in June, 1868. The weight of the testimony is in favor of the conclusion, however, that, at the time the plaintiff entered the services of Osborn & Co. (which was only for one year), it was agreed that the defendant should serve the firm without charge for that year. We are clearly of the opinion that it was not understood that that agreement should extend beyond the year for which the plaintiff had accepted employment with Osborn & Co. There was no reason for such an agreement extending over the eleven years, and certainly nothing was said or done to warrant the conclusion that it was so agreed. The rule is that, if an agreement that a partner shall be paid for his services can be fairly and justly implied from the course of business between the copartners, he is entitled to recover. *Levi v. Karrick*, 13 Iowa, 344; *Sears v. Munson*, 23 Iowa, 389; *Boardman v. Close*, 44 Iowa, 428. We are in no doubt, from the course of business between the copartners, that it was understood and intended, when the plaintiff remained with Osborn & Co. after the first year, that the defendant should be compensated to the extent of the reasonable value of his services to the partnership over those rendered by the plaintiff. It would certainly be unreasonable that the parties expected the defendant

to render these years of service without any compensation. It appears that the plaintiff contributed from time to time from his salary with Osborn & Co. to the capital of the firm, and it is urged, therefore, that this shows that the defendant was not to be allowed for his time. It does show that the plaintiff's salary was not to go into the firm as against defendant's time, but certainly does not tend to show that the defendant was not to be compensated.

The plaintiff contends that the services rendered were valueless, and seeks to charge upon the defendant the entire responsibility for the confusion into which the accounts have fallen for want of proper books. This responsibility is not entirely with the defendant. The plaintiff was a frequent visitor at his home, and spent at least three months of each year there looking after the business, and does not seem to have been any more efficient in bookkeeping than the defendant. Both were undoubtedly negligent in the management of their business, the defendant, however, in a larger degree. While the defendant seems to have been inefficient in causing correct accounts to be kept, he was quite successful in building up a large business with the assistance of the plaintiff. The defendant testifies that his services were worth at least one thousand dollars per year, and this stands undenied, except as it is disputed by the nature of his services. We reach the conclusion that the defendant is entitled to no compensation from June, 1868, till June, 1869, because of the agreement, and that from the facts we imply an agreement that he should have reasonable compensation for the remainder of the time that the plaintiff remained in the employment of Osborn & Co. The plaintiff devoted three months of each year to the business of the firm, thereby equalizing the services of defendant for the same period. It follows that the defendant should only be allowed compensation for the nine months in each year, which,

at the rate of one thousand dollars per year, is seven hundred and fifty dollars. It is not clear just when the plaintiff quit the employment of Osborn & Co., and commenced rendering continued services to the firm of Morris & Griffin, but it is evident that it was no earlier than June, 1879. We reach the conclusion that, in addition to the credits given to the defendant in the result already found, he should be credited with ten years' services, at seven hundred and fifty dollars per year, or seventy-five hundred dollars, leaving his indebtedness to the firm of Morris & Griffin, seven thousand and eighty-nine dollars and twenty-five cents, instead of fourteen thousand, five hundred and eighty-nine dollars and twenty-five cents, as found in the decree.

The decree being in other respects correct, the case is remanded for the entering of a decree in conformity of this opinion. MODIFIED AND AFFIRMED.

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## J. W. WRIGHT, Appellee, v. E. M. DICKEY CO., Appellant, and SIBLEY LOANING COMPANY, Intervener, Appellee.

**Mortgage on Growing Crops**: SALE: PURCHASER CHARGED WITH NOTICE AFTER HARVEST. The record of a mortgage upon crops to be raised by a person named upon certain described premises, is notice of such lien upon said property after the crops have been harvested and carried to market, as against a purchaser of the same upon the market in good faith.

*Appeal from Lyon District Court.* — HON. G. W. WAKEFIELD, Judge.

FRIDAY, OCTOBER 9, 1891.

ONE Irwin was the tenant of, and raised wheat on the land of, the plaintiff Wright during the year 1888, on which the law gave to Wright a lien for his rental.

February 15, 1888, Irwin gave to the intervener a mortgage on the crops thus raised, and the description in the mortgage is: "All crops raised this year on the eighty acres I rent on the southeast quarter of section 21, township 99, range 43; also, all crops I raise on the northeast quarter of 28 — 99 — 43, — altogether about one hundred and sixty acres." In October, 1888, after the wheat was threshed, it was sold on the market by Irwin to the E. M. Dickey Co., for which a full price was paid, and without any knowledge of a lien thereon, except such as was imparted by the record of the mortgage to the intervener, which was filed February 16, 1888. Wright brings this action against the E. M. Dickey Co., to recover the value of the wheat because of his landlord's lien. The defendant, the E. M. Dickey Co., and the intervener, the Sibley Loaning Company, unite in resisting the claim of the plaintiff; and the intervener further claims of the E. Mr. Dickey Co. the value of the wheat by virtue of its mortgage, which the E. M. Dickey Co. resists, undet the plea of its purchase in open market, in good faith, and with no actual knowledge of the mortgage lien. The district court gave judgment for the intervener against both the plaintiff and the defendant. The defendant company alone appeals.—*Affirmed.*

*J. D. F. Smith*, for appellant.

*O. J. Clark*, for appellee.

GRANGER, J.—Inasmuch as the E. M. Dickey Company has alone appealed, the controversy here is only as to the validity of the judgment in favor of the intervener against the E. M. Dickey Co. The point is somewhat argued as to the sufficiency of the description in the mortgage to impart constructive notice; but, as the argument of the appellant practically concedes that the description is sufficient "had the grain been upon

the ground on which it had been raised" we are only to determine its sufficiency to impart notice after the grain had been harvested, threshed and put upon the market.

The query we are expected to meet will be better understood by the following, from the appellant's argument: "For this court to sustain a rule of law that will permit a party to change entirely the identity of the property, and say that the purchaser in good faith, and for a valuable consideration, is bound thereby, seems to us to be a complete setting aside of the law which provides that a conveyance of personal property without change of possession, or where the vendor retains possession, shall be of no effect and validity without the execution and recording of an instrument conveying the same." All persons were required to take notice of the mortgage made by Irwin to the intervener before the crop was severed from the ground, for the mortgage then came within the rule that, "in order to charge third persons with constructive notice of a chattel mortgage, the description as contained in the mortgage must direct the mind to the evidence whereby the precise thing conveyed may be ascertained." The query then is, how much less did the mortgage do in that respect after the grain was threshed and offered on the market? or, how much less would such a mortgage enable one to identify the particular grain after it was threshed, than it would if the mortgage had been given on the grain after it was threshed and in the bin, describing it as wheat in a particular bin on certain premises? Stress is placed on the fact that this grain was offered in open market in town. Now, the buyer on the market knew Irwin's grain while growing was mortgaged, and that the mortgage continued unsatisfied upon the record; and we think such a mortgage just as effectually directs the mind to evidence whereby a buyer in open market may

know the identity of the grain, as if the grain was mortgaged after it was threshed, and then placed upon the market. It is true that in either case the identification is difficult, and legislation in this respect might serve a useful purpose; but we are not prepared to say that the difficulties are such that such mortgages as to third persons without actual notice are void, and such is the effect of the rule, as claimed. As we have said, the record was notice that the grain grown by Irwin on certain land was mortgaged. Irwin offered the grain for sale. This knowledge from the record was sufficient to put a purchaser on inquiry, and to our minds an inquiry would have disclosed the actual condition of the grain. The changed condition of the property, by being severed from the ground, and placed upon the market, does not, when viewed in the light of its practical effect, necessitate a change of the rule. A consideration of the question will lead to a conclusion that the same practical difficulties lie in the way of an incumbrance on threshed grain, stock and products of a farm when taken therefrom to market places for sale. The ruling of the district court is in harmony with the general rule, long observed in this state, and we see no reason now to depart from it, even though other courts, under statutes quite similar, have held differently.

The judgment is AFFIRMED.

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## H. NORTON, Appellant, v. WILSON LUMPKIN *et al.*, Appellees.

**Sale**: BONA FIDE PURCHASER: UNRECORDED MORTGAGE: NOTICE: FRAUD. The defendant L. having executed and delivered a mortgage upon his stock of lumber to the plaintiff, and being insolvent, and unable to pay an indebtedness to the defendant W. of less than one-half the value of his stock, made to W. a bill of sale of said stock, for which

W. gave his notes to L. in the sum of forty-five hundred dollars. The plaintiff's mortgage was not recorded, and W. took the bill of sale without actual notice thereof. The transaction between L. and W. was hastily consummated, no invoice of the property being taken before the purchase, and W., without knowing the value of the property, gave his notes therefor to L. for several hundred dollars more than it was worth, and accepted the bill of sale without reading it. W., as county treasurer, however, was in immediate need of money to enable him to make his settlement with the board of supervisors, and had an agreement with L. that the property should be invoiced, and that any deficiency in value should be credited on the notes. After receiving the bill of sale W. obtained a loan at a bank of the size of one of the notes given to L., depositing the bill of sale as security therefor, and L. turned over to the bank the other note given by W., to apply upon L.'s indebtedness to the bank. At the time of this transaction one of the officers of the bank knew of the mortgage to the plaintiff, but was told that he had waived it in order that the sale might be made, and another of its officers had known of it, but had forgotten it. *Held*, that W. was entitled to protection as an innocent purchaser as against the plaintiff's mortgage to the full amount of the consideration given though he acquired notice of said mortgage before the notes aforesaid were paid, and that the bank's title to the notes were not subject to attack by the plaintiff.

*Appeal from Webster District Court.*—HON. S. M. WEAVER, Judge.

FRIDAY, OCTOBER 9, 1891.

ACTION in equity to recover the amount due on two promissory notes, for the foreclosure of a chattel mortgage, and for general equitable relief. There was a hearing on the merits, and a judgment in favor of the plaintiff for a part only of the relief demanded. He appeals.—*Affirmed.*

*John F. Duncombe*, *M. D. O'Connell* and *John Doud, Jr.*, for appellant.

*R. M. Wright*, for appellees.

ROBINSON, J.—The defendant Lumpkin, for several years prior to January, 1888, owned and carried on at

Ft. Dodge a lumber yard. In January, 1883, he borrowed of the plaintiff the sum of forty-five hundred dollars, and to secure its payment executed a chattel mortgage on his stock of lumber. Some payments were made on the loan, and it was renewed from time to time, and new mortgages given as security. In January, 1887, the loan was again renewed, and the notes in suit, one of which was for one thousand dollars, payable on the first day of November, 1887, and the other for twenty-five hundred dollars, payable on the twenty-fourth day of January, 1888, each bearing interest at the rate of ten per cent. per annum, were given to secure the payment of these notes. A mortgage was executed, but it was not satisfactory to the plaintiff, who returned it, and received in exchange the one involved in this action. It was executed on the sixteenth day of July, 1887, and was upon the entire stock of lumber, sash, doors, building-paper, screen doors and fence posts, which composed the stock of the mortgagor. That mortgage was not recorded until the twenty-fourth day of January, 1888, and none of the mortgages preceding it were ever recorded. Payments amounting to three hundred and nineteen dollars and twenty-one cents have been made on the notes. On the fifth day of January, 1888, Lumpkin gave to the defendant, D. A. Weller, a bill of sale conveying the mortgaged property, a safe, scales and office furniture. The consideration named in the bill of sale was four thousand dollars. Two notes were given for it by Weller to Lumpkin, one of which was for seventeen hundred dollars and the other for twenty-three hundred dollars.

It is claimed by the plaintiff, in effect and substance, that the alleged sale from Lumpkin to Weller was not in good faith, but was fraudulent; that, before payment for the property was made, Weller had actual

notice of the mortgage of the plaintiff; that, when the sale was made, Weller had actual knowledge of the mortgage of the plaintiff; that, if he did not have actual notice, he had knowledge of such facts as that he was chargeable with notice; that his agents in the transaction had actual knowledge of the mortgage, and, therefore, that he had constructive notice; and that the transaction was really for the benefit of the intervener, which knew at the time it took place, through its officers, of the existence of the mortgage. The district court rendered judgment in favor of the plaintiff and against Lumpkin for thirty-eight hundred and ninety-one dollars and sixty cents, but on the question of priority of liens found in favor of Weller and the bank, the latter having intervened in the action.

Weller was treasurer of Webster county during the term of two years, which ended in January, 1888; and Blanden, the president, and Scott, the cashier, of intervener, were sureties on his official bond. During the year 1887, Lumpkin had borrowed of Weller various sums of money, and in the latter part of December of that year, and until the bill of sale and notes in controversy were given, in 1888, owed him seventeen hundred dollars. Both Weller and Lumpkin were insolvent at the time. Weller could not make his final settlement with the board of supervisors without the money which Lumpkin was owing him, and he made frequent demands for it, but Lumpkin was unable to pay it. At length it was arranged that Lumpkin should sell the lumber yard to Weller, and that the latter should give his notes therefor; that one of the notes should be for the sum of seventeen hundred dollars, and the other for the sum of twenty-three hundred dollars; but that an invoice of stock should be taken, and, if its value was found to be less than four thousand dollars, then that a credit for the deficiency should be given on the large note. The sale was made

and the notes were given pursuant to the agreement. The seventeen-hundred-dollar note was presented to the intervener for discount, but, as Lumpkin was then owing it a large amount, Weller gave a new note in lieu of it, which was made payable to the intervener. The amount of the note was placed to the credit of Weller, and the bill of sale was left as security for the payment of the note. Lumpkin turned the twenty-three-hundred-dollar note over to the intervener to apply on his indebtedness to it.

Weller testifies positively that he had no knowledge whatever of the mortgage to the plaintiff until after he had purchased the lumber yard, taken possession of it, and given his notes for it. He is corroborated in that by Lumpkin. It is insisted by the appellant that Weller must have known that Lumpkin was financially embarrassed when the bill of sale was made, for the reason that they had been intimately acquainted for years, were members of the same church, and of the same association of Odd Fellows. We do not think such a presumption arises from the facts disclosed by the record. The testimony is direct that Weller had very little knowledge of Lumpkin's financial affairs.

It is said that the purchase was made with undue haste, and without the precautions which a man of ordinary business prudence would have taken; but it is apparent that Weller at the time was chiefly concerned to raise the money required in his settlement with the board of supervisors, and that he was willing to incur the risk of some loss of money to procure it. But he cannot be said to have been imprudent in making the purchase. It is true, he did not know the value of the property at the time, and that he gave his notes for several hundred dollars more than its value, as shown by the invoice which was afterwards taken; but it was necessary for him to have the money before an invoice could be taken, and the agreement of purchase provided

for the giving of proper credits in case the property should prove to be worth less than the amount of his notes, and such credit was in fact afterwards given. It is true he did not read the bill of sale with care before closing the transaction, but it had been drawn by an attorney in whom he had confidence, and his course was not unnatural nor unusual.

The appellant places much stress upon certain dealings between the parties which occurred after the sale of the lumber yard was concluded, but they were not connected with that sale, and cannot be considered in determining its character. It is said that Lumpkin retained possession of the yard after the sale was made, and that he afterwards gave prices on at least one bill of lumber in his own name; also, that he made statements to different persons showing that he had fully disclosed to Weller the fact that the plaintiff held a mortgage on the property before the sale was completed. Lumpkin remained in the yard after the sale, but he did so for the purpose of assisting Weller in the business. His acts in offering to furnish a bill of lumber in his own name, and stating to others that Weller knew of the plaintiff's mortgage when he purchased,—if such statements were made,—were not with the knowledge nor consent of Weller, and would not affect his interests. It satisfactorily appears that Weller took possession of the property included in the bill of sale when it was delivered. Blanden at one time knew of the plaintiff's claim, but the evidence fails to show that he remembered it when the sale was made. Scott did know of it at that time, although he was told the plaintiff had waived it to allow the sale to be made. He and Blanden interested themselves to have the sale effected, Scott going to the office of the attorneys interested with the matter to see that the bill of sale was properly drawn; but what he and Blanden did in regard to it

was not done as agents for Weller, nor in behalf of the intervener, but for the purpose of having Weller secure the money needed in his settlement, and thus to release themselves from liability on his official bond. Weller had not authorized them to act for him, and at that time it had not been arranged that the intervener should take the notes.

It is said that, even if Weller did not know of the plaintiff's mortgage when he gave his notes and took the bill of sale, he acquired that knowledge before the notes were paid. The sale to Weller was valid, and could not have been defeated. He took the property without notice of any kind that the plaintiff held a claim against it, and gave his notes for the purchase price. He immediately paid the smaller of the two notes by giving another to the intervener. The other note was negotiable, and after a credit of five hundred and sixty-three dollars and thirteen cents, for deficiency in value of lumber, was indorsed thereon, and before it was due, it was transferred to intervener, and credit therefor given to Lumpkin on the amount he was owing intervener. The indebtedness of seventeen hundred dollars from Lumpkin to Weller had been canceled. Under these circumstances the liability of Weller on the notes given for the lumber yard was fixed, and he is entitled to protection as an innocent purchaser to the full amount of the consideration given, and the intervener acquired title to the note which is not subject to defense on the part of Weller, and cannot be defeated by the plaintiff.

We have not found it practicable to review at length each point discussed by counsel for the appellant. What we have said disposes of the controlling questions of the case. There were some circumstances well calculated to cast suspicion upon the good faith of the parties connected with the transactions in controversy, but the claims made by the appellees are reasonable,

and supported by direct and credible evidence, while the claims of the appellant rest largely upon circumstances which, though suspicious in themselves, do not show fraud conclusively, and, so far as material, have been satisfactorily explained. AFFIRMED.

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# REYNOLDS & CHURCHILL, Appellants, v. G. W. HAINES, Appellee.

**Property Exempt from Execution:** INSURANCE ON SAME. Where personal property exempt from execution, under section 3072 of the Code, is destroyed by fire, the avails of an insurance policy upon such property is likewise exempt.

*Appeal from Fayette District Court.*—HON. L. O. HATCH, Judge.

FRIDAY, OCTOBER 9, 1891.

PROCEEDINGS by garnishment against an insurance company to subject a sum due the defendant on a policy, upon which there had been a loss, to the payment of a judgment in favor of the plaintiffs. The proceedings were dismissed upon motion, on the ground that the money due on the policy is exempt from seizure for the debts of the defendant. The plaintiffs appeal.—*Affirmed.*

*G. H. Phillips* and *Ainsworth & Hobson*, for appellants.

*H. W. Clements*, for appellee.

BECK, C. J.—I. The plaintiffs caused process of garnishment to be issued against the Capital Insurance Company upon a judgment against the defendant,

claiming that the insurance company is a debtor of the defendant upon a policy issued to him upon which there had been a loss of the property insured. A motion to dismiss the proceeding was sustained upon the grounds, which were not disputed, that the property insured was exempt from execution, being books, instruments, etc., used by the defendant, who was a physician and surgeon, in the practice of his profession.

II. The question presented for decision by the record is this: Are the avails of insurance upon personal property which is exempt under the statute from debts of the assured also exempt? The statute, Code, section 3072, declares that, "If the debtor is a resident of this state, and is the head of a family, he may hold exempt from execution" certain personal property, which includes the books, instruments, etc., of a physician, the property covered by the policy of insurance in this case. There is no provision as to the exemption or liability of the proceeds or avails of such property when disposed of by sale or otherwise.

III. The purpose of the statute is to secure to the debtor who is the head of the family—a physician and surgeon in this case—the instruments, books and other articles which enable him to practice his profession. Its purpose is to secure the necessaries of life—food, raiment and shelter—to families who are dependent upon the heads thereof, by securing to them the instruments and means by the use of which they are enabled to support their families. The exemption is plainly for the benefit of the families of debtors, for those having no family can claim no exemption. The statute must be liberally construed, to carry out its purpose and spirit. *Bevan v. Hayden*, 13 Iowa, 122; *Davis v. Humphrey*, 22 Iowa, 139; *Kaiser v. Seaton*, 62 Iowa, 463. The debtor in the case before us was authorized, under the statute, to hold the property in question exempt from debts, if it were used for the purpose of his pro-

fession. It is plain that the use for which the property was kept determined the question of its exemption. The books, instruments, etc., of the physician and surgeon may be kept subject to the authority to change them, by sale or otherwise, in order to procure those of better character or improved construction. It is plain that the physician may sell his books, and replace them by better ones. Such sale is a proper use of his books and instruments in his profession. Another proper use of his books and instruments is their preservation from injury and destruction. He may insure them, to protect himself and family from loss from fire. The fact that they were insured would not make them subject to his debts. If they are destroyed by fire, the indemnity secured by insurance stands in the place of the books. It is intended to preserve the physician's library by securing means for its restoration after it is lost by fire. Surely that indemnity which is the indebtedness of the insurance company, or the money paid by it, stands in the place of the library, and ought to be, as it is, exempt from execution. The money due on the policy stands in the place of the property destroyed, and this must be true whether the money takes the place of the property by contract, or is acquired *in invitum* by proceedings against the owner.

It is plain that a trespasser, by appropriating the property and converting it to his own use, cannot make it subject to the payment of the owner's debts by holding the value of the property the measure of the debtor's damages for the trespass, subject to garnishment by the creditors. If he could do this, it would be a convenient method to defeat the exemptions of the statute. As we before remarked, the object of the statute is to secure to the family the benefit of certain property. These benefits cannot be enjoyed unless the debtor have the unrestricted use and control of the property free from liability for debts as long as it is owned

and used by him. When it is used for other purposes than the support of the family, it becomes liable for debts. But the change of the property into money will not indicate an immediate abandonment of the claim of exemption to the money on the ground of a purpose to invest it in like or other exempt property. Until an opportunity exists to make such investment, which is not a change of articles of exempt property, the debtor ought not to be presumed to abandon his claim. The debtor, as we have seen, has the authority to change the articles of exempt property by sale and purchase, exchange, or otherwise. He cannot be presumed to have abandoned his right to this authority until he has had an opportunity to exercise it. The creditor cannot complain of its exercise. He is defeated of no right thereby. The property is held free of his debt, and he is not prejudiced by the change to other like property. These doctrines and conclusions find support in the following decisions of this court: *Kaiser v. Seaton*, 62 Iowa, 463; *Mudge v. Lanning*, 68 Iowa, 641. See, also, cases cited in *Kaiser v. Seaton*, *supra*, and the following: *Evans v. St. Paul Harvester Works*, 63 Iowa, 204; *Brainard v. Simmons*, 67 Iowa, 646; *Leavitt v. Metcalf*, 2 Vt. 342; *Mulliken v. Winter*, 2 Duv. 256; *Tillotson v. Walcott*, 48 N. Y. 188.

Counsel for the plaintiffs cite *Wooster v. Page*, 54 N. H. 125. It is not in harmony with our conclusions. We think that the reasoning upon which it is based is not sound. Other cases cited by the same counsel are not in conflict with our conclusions. They are to the effect that sales of exempt property, with no purpose to reinvest the avails in other like property, or to exchange the articles of exempted property, or are cases involving the exemption of pension money, and some other cases involving like questions, none of which are in conflict with our conclusions in this case.

We reach the conclusion that the judgment of the district court ought to be AFFIRMED.

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# SAMUEL COLLINS, Appellant, v. BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY Appellee.

1 **Railroads**: CUSTOM: PERSONAL INJURY: CONTRIBUTORY NEGLIGENCE. The plaintiff as custodian of the defendant's oil house had to place the switch lights on the stands every evening, and collect them for cleaning and filling every morning. While engaged in collecting the lamps one morning, and while walking between two of the defendant's tracks, the plaintiff saw a mail and express car pushed by a switch engine coming toward him on the main track, and stepped onto a sidetrack and turned, with his back to the approaching car, to give warning to one S. that a man with a team was on the crossing. Before he had turned facing the car again the car had been "kicked" by the engine onto the sidetrack, and the same struck the plaintiff while in the act of taking a lamp from the switch stand, and injured him. The evidence showed that the car in question was regularly taken from the sidetrack every morning, and pushed back to a train on the main track, and that the car had never been known to be pushed back onto the sidetrack after it had been pulled out. *Held*, that the plaintiff was guilty of contributory negligence, and was not, therefore, entitled to recover damages of the defendant for the injuries sustained.

2. ———: ———: ———: JUSTIFICATION, One who turns his back to a moving train, while standing on a railway track, merely to satisfy his curiosity, will not be justified in relying upon a custom as to the movement of trains, which if observed, would have rendered his action safe.

3. **Practice**: DIRECTION TO JURY AS TO VERDICT. The facts upon which the finding that the plaintiff was guilty of contributory negligence being undisputed, *held*, that the trial court rightly refused to submit the question to the jury. [BECK, C. J. *dissenting*.]

*Appeal from Emmet District Court.*—HON. GEORGE H. CARR, Judge.

FRIDAY, OCTOBER 9, 1891.

ACTION to recover for personal injuries. The case was tried to a jury, and at the conclusion of the testimony for the plaintiff defendant moved for a verdict on the following grounds: *First.* For that by plaintiff's own showing he is guilty of such contributory

negligence as to preclude his right of recovery in walking on the track, and not observing the approach of the car that struck him, and he has not shown any negligence against the company. *Second.* The evidence shows that the duties of the plaintiff did not require him to engage in the dangers of operating a railroad, but that he was employed solely to work at the oil house, and perform other duties that did not require him to ride on the cars or to work about moving trains or cars operating the road; and plaintiff is, therefore, not within section 1307 of the Code of Iowa." This motion was sustained, and a verdict directed and returned for the defendant. The plaintiff's motion in arrest of judgment and for new trial being overruled, judgment was entered against him on the verdict. The plaintiff appeals. The errors assigned and argued are as to the ruling of the court in sustaining the defendant's motion for verdict.—*Affirmed.*

*J. G. Myerly*, for appellant.

*S. K. Tracy* and *F. E. Allen*, for appellee.

GIVEN, J.—I. Following the order of the motion, we first inquire whether the plaintiff was guilty of such contributory negligence as to preclude him from recovering. The rule is undisputed that, if he was guilty of negligence directly contributing to cause the injuries complained of, he cannot recover, even though the defendant was negligent as charged. In pursuing this inquiry, we must not confound the testimony tending to show negligence on the part of the defendant with that relating to negligence or care on the part of the plaintiff. The testimony, so far as it relates to the question of negligence on the part of the plaintiff, is in substance as follows: At the time of the accident, March 30, 1889, the plaintiff was aged forty-four years,

1. RAILROADS: custom: personal injury: contributory negligence.

able-bodied, good hearing and sight, and with four years' experience as an employe of the defendant at its station at Estherville, as fireman on the switch engine for several months and the remainder of the four years as custodian of the oil house and supplies. He was familiar with the locality of the accident and the movement of trains thereat. At the time of the accident he was in charge of the oil house and supplies, his duties being to take charge of the house and supplies, to place the switch lights on the stands every evening, and to collect them for cleaning and filling at the oil house every morning. Estherville was a division station on the road, the general direction of which at that point is north and south. Three tracks passed the depot building, one on the south being known as the "passing track," the one on the north as the "city track," the main line being between, and with which both sidetracks connected north of the depot building. The switch stand to the passing track was on the west side of the track, and further north were other sidetracks, the oil house and the roundhouse. It was usual to change locomotives, and to add a combination mail and express car to the train arriving from the south about seven A. M. each day, for the purpose of the run further north. The combination car, on returning from the north, was left standing on some one of the several sidetracks, and in the morning, before the arrival of the train from the south, was set in upon the passing track. This car was usually put into the train by the south-end engine drawing it north from the passing track onto the main line, and pushing or "kicking" it back to the train on the main line, with a brakeman on board to control its movements. Several witnesses familiar with the way this car was put into the train testified that they never saw it done differently, and that they never knew it to be pushed back onto the passing track after it had been pulled out.

On the morning of the accident there was a box car in the train which necessitated some additional movements in disposing of it, and getting the combination car in place in the train. It appears that after the combination car had been pulled onto the main line it was pushed or kicked back in onto the passing track, instead of along the main line, as was usually done. This movement was necessary for the purpose of disposing of the box car, and getting the combination car in place. While this switching was being done, the plaintiff started from the depot building north, between the passing track and the main line, towards the switch stand west of the passing track, for the purpose of getting the lamps. He testifies as follows: "When I got about half way between the clearing post and switch stand I saw the mail and express car and engine coming along at a good jog up the main track back up to me. It came into my head that there was a team crossing the track at the depot. I turned, and saw there was, and stepped over or just back, and stopped on the track switch, and called Mr. Sargent's attention that there was a team on the track; that the car was coming up there, The team was standing on the main line. As soon as I saw Mr. Sargent turn round, I turned to get the switch light as the car struck me. I did not get turned around. I was kind of turned around when the car struck me. * * * When I saw this car and engine they were on this street crossing, moving down on the main line towards the depot. Did not notice how fast they were going. Did not stop to look whether it was on the main line or passing track. I took it for granted it would go down the main line. Don't know anything about the advice the boys were giving Pingry about driving his team. That was not what made me turn around. The reason I turned around was, when I saw the car coming on the main line, I supposed it was coming down the main line,

and knew this team was in on the track, and I turned around to see if it was there. It was on the track when I turned around. * * * From my own knowledge, could not say there was no brakeman on the car, but I saw none on the car." As to these statements, there is no conflict, and we are to determine therefrom whether they showed such negligence on the part of the plaintiff as entitled the defendant to a verdict.

It will be seen that the plaintiff went upon the track when he knew it was dangerous for him to do so because of the switching, and that he might have avoided that danger by going at a different time. Being on the track, he saw the car, without a brakeman on the front end, approaching him within one hundred feet, "at a good jog, twice as fast as usual." He, without looking to see upon which track, when a single glance would have revealed the fact, stepped upon the passing track, and was injured. Surely, such actions, unexplained, cannot be considered other than the grossest negligence.

Two facts are argued in explanation, either of which it is claimed show that he was not negligent, to-wit, the custom of moving the car on the main line, and that the plaintiff in the line of duty had turned to warn the man with a team on the crossing. There was no inflexible rule that prevented the defendant from moving its car back upon the passing track, if, as in this instance, its business required it. It was the custom for the defendant's train to go west at seven A. M., but it would be no excuse to one who saw it coming that he turned his back, and did not get off the track, because the train was behind time, and not passing as was customary. If we may call the practice of moving the car a custom, still it was a custom that was liable to be varied, and the plaintiff must have known that the car might rightfully be moved back onto the pass-

ing track, and in the absence of other excuse he must be held negligent in not looking to see upon which track it was approaching. If he was rightfully and necessarily upon the track, and the circumstances were such as to prevent him from seeing or knowing upon which track the car was coming, then he might rightfully act upon the custom, but as it was a custom liable to be varied, and as by looking he could know whether it was being varied or not, it was his duty, under these circumstances, to look and know, unless there was some other reason to excuse him from looking than the custom. "He must not go blindly and heedlessly to his work when there is danger." *Magee v. Chicago & N. W. Ry. Co.*, 82 Iowa, 249, and authorities cited therein.

II. The other contention is that the plaintiff was justified in taking it for granted that the car would be moved down the main line, and in not looking, because of his having turned his back to the car to give warning to a man with a team on the crossing of the main track. *Greenleaf v. St. L., K. & N. W. Ry. Co*,. 33 Iowa, 53, and *Baldwin v. D. & S. C. Ry. Co.*, 63 Iowa, 210, are cited. In the former case, the plaintiff stood on a moving car with his back to the water-spout, against which he was carried, and by which he was struck, "watching for a signal from the conductor to be communicated to the engineer." In the other, the plaintiff was injured by the falling of a pile of lumber because of the negligent manner in which it had been piled. It was held that he was under no duty to examine the manner in which it was piled, and had a right to assume that it was carefully piled.

2. —: —: —: justification.

The only testimony upon this subject is that of the plaintiff himself, which we have already quoted. It does not appear that he gave, or attempted to give, any warning to the man in charge of the team. He says: "It came into my head that there was a team across the track at the depot, and I turned and saw

there was, and stepped over or just back, and stepped onto the passing track switch, and called Mr. Sargent's attention that there was a team on the track; that the car was coming up there. The team was standing on the main line. As soon as I saw Mr. Sargent turn around, I turned to get the switch light as the car struck me." His only other statement on this subject is: "Don't know anything about the advice the boys were giving Pingry about driving his team. That was not what made me turn around. The reason I turned around was when I saw this car coming on the main line I supposed it was coming down on the main line, and knew this team was on the track, and I turned around to see if it was there. It was on the track when I turned around. It was about two hundred and fifty to three hundred feet from the depot where I turned around." It is stated elsewhere that the team was on the crossing near the depot.

It seems evident from these statements that the plaintiff's movements were influenced entirely by the belief that the car would move down the main line. He did not even attempt to give any warning to the man on the crossing, and we may say, from the distance that he was from the crossing, probably could not do so. He does not say that he turned around to give warning, but "turned around to see if it was there." The conduct of the plaintiff, as shown in this testimony, furnishes another of the many instances in which men engaged in dangerous employments become negligent as to the dangers about them. No ordinarily prudent, cautious man, alive to the dangers of the situation, would have gone upon those tracks at the time the plaintiff did, or, if upon them, would have yielded to idle curiosity, and failed to have avoided the dangers which overtook him and caused his injury. No reason, whatever, is offered for his going upon the track when he did. It was a time of danger, and his

duty did not require that he should go upon the track at that very time. He could have gone for the lamp after the few minutes required for the switching as well as when he did. There is no reason offered why he was not negligent in going upon the track at that time, and for this reason alone, if not for the others named, the defendant's motion for verdict was properly sustained.

III. The appellant contends that the question of contributory negligence should have been submitted to the jury, and cites *Milne v. Walker*, 59 Iowa, 186. We think this case is within the rule there announced. The facts, as we have stated them, are undisputed. There is no conflict as to the time or manner in which the plaintiff went upon the tracks, and was injured. "We think the undisputed facts in this case show, as a matter of law, that the plaintiff is not entitled to recover." It follows from this conclusion that there was no error in sustaining the motion for verdict. As this fully disposes of the case, we need not consider the other questions discussed, further than to say that the testimony excluded upon defendant's objection did not relate to the question of plaintiff's negligence.

8. PRACTICE: direction to jury as to verdict.

The judgment of the district court is AFFIRMED.

BECK, C. J. (*dissenting*).—I. The evidence shows that the duties of the plaintiff required him to go upon the railroad tracks at the locality where the accident occurred, and that at the time he was injured he was upon the tracks in the discharge of his duty. It is also shown, without conflict in the evidence, that by the uniform and unvaried custom and course of business of the defendant's employes in attaching the combination car to the train it was never moved upon the "passing track," but always, upon the arrival of the

train to which it was to be attached, it was taken from the "passing track," where it had been left, to the main line and "shoved" or "kicked" on that line to the train. The plaintiff and three or four other witnesses all unite in testifying that this was the uniform course of the business, which not one of them had ever seen varied. It is to be inferred that this custom was based upon the necessity of moving the combination car upon the main track in order to attach it to the train which stood upon that track. But, whatever may have been the reason of the custom, it is a custom that was never disregarded, within the knowledge of the witnesses. There is not one word of evidence tending to show any reason or necessity for departing from the custom at the time the plaintiff was injured, or that the plaintiff had any notice or warning of the disregard of the uniform custom, or had any ground or reason to anticipate the use at that time of the passing track for moving thereon the combination car. It is certain that, as a reasonable and prudent man, he was authorized to rely upon this unvaried custom of taking the combination car to the train upon the main track at the time the accident occurred. As we have seen, he was without fault and in the discharge of his duty upon the tracks; and without fault, and with the purpose of protecting the interests of the defendant, he gave warning of the fact that a team was on the track. In doing this, he was compelled to turn towards the person he warned. He stepped upon the "passing track," and was struck by the combination car, which was moved upon that track instead of the main track. The evidence shows that this car was "kicked" upon the "passing track;" that is, it was separated from the engine, and was carried by its own momentum, the engine being stopped. It also clearly shows that no brakeman or other person was on the end of this car which was towards the plaintiff, and the evidence tends

to show that no one was anywhere on the car, which was moved at an unusual rate of speed, some of the witnesses testifying that it moved twice as rapidly as the ordinary speed.

II. Upon these facts, in addition to those stated in the opinion, I conclude, *first*, that the evidence tends to show that the defendant's employes in charge of the combination car, and the locomotive moving it, were negligent in using the "passing track" on the occasion without warning or signal, contrary to the custom and course of business of the plaintiff and its employes; in running the car at an unusual speed, and without a brakeman or other person upon it to control its movements, and keep a lookout to warn others of danger, on account of the movements of the car; and, *second*, that the plaintiff did not contribute to his injury by his own negligence.

III. The facts which I have just stated plainly tend to show the defendant's negligence. Its duty required it to use sufficient precautions to guard against accidents which might result from the disregard of its custom in handling the combination car. The evidence tends to show none. But it does tend to show unusual speed of the car without the presence of a brakeman or other person in control of it, or give notice of warning of its approach. There is no evidence of any warning of the approach of the car upon the passing track. Other grounds upon which negligence may be inferred could be mentioned.

IV. The plaintiff was authorized to presume that the usual custom and course of business in handling the combination car would be followed, and that the employes in charge of the car and locomotive would act in accord with the usual custom, and with proper care to avoid accidents. Resting upon this presumption, he was authorized to believe that the combination car was on the main line, and it was not, therefore,

negligence for him to step upon the "passing track," believing that the approaching car was on the main track. *Pringle v. Chicago, R. I. & P. Ry. Co.*, 64 Iowa, 613; *Crowley v. Burlington, C. R. & N. Ry. Co.*, 65 Iowa, 658; *Steele v. Central Ry. Co.*, 43 Iowa, 109; *Beems v. Chicago, R. I. & P. Ry. Co.*, 58 Iowa, 150.

V. But it is said that, if he had stopped and looked, he could have seen the switch was so set as to show the approach of the car upon the "passing track." This position may be, for the purpose of the case, admitted. But the defendant believing, as he was authorized to believe, that the combination car was on the main track, his vigilance, caution, and even instincts for self-preservation, were overcome by his belief, which stood in the place of knowledge, and prompted his action. Men of intelligence and ordinary prudence would have acted in this way. He is not, therefore, to be charged with the effects of negligence.

VI. Besides, men required to act with promptness are not negligent because they do not stop and hesitate, and consider whether the knowledge and beliefs they possess and entertain are correct, and thus delay action until probably the time is passed in which they may be able to act. In the running and management of trains, promptness and decision are demanded. Therefore, employes must be permitted to act upon the belief and presumption that all customs and rules usually followed in all like cases are observed and obeyed in the matters wherein they are called upon to act. I reach the conclusion that the defendant was negligent, and that the plaintiff did not contribute to his injury by his own negligence.

Therefore, in my opinion, the judgment of the district court ought to be reversed.

# MARY P. HEATH, Appellant, v. T. ELLIOTT, Appellee.

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**Guardian and Ward:** ACCOUNTING: LACHES: LIMITATION OF ACTIONS. Where a ward delayed for more than twenty years after attaining her majority to ask an accounting with her guardian, and the evidence showed that the latter had made a settlement with the court, though the record thereof was informal, *held*, that the ward's action for an accounting was barred by the statute of limitations.

*Appeal from Monona District Court.*—HON. SCOTT M. LADD, Judge.

FRIDAY, OCTOBER 9, 1891.

THIS is an action to compel an accounting for money alleged to have been received by the defendant as guardian of the plaintiff during her minority. There was a trial upon the merits, and the plaintiff's petition was dismissed, and she appeals.—*Affirmed.*

*Chas. MacKenzie* and *Dewell & McGavren*, for appellant.

*Chas. E. Underhill* and *Craig S. Wright*, for appellee.

ROTHROCK, J.—The plaintiff became of age in the year 1866. The defendant was her guardian for some four years before she arrived at her majority. It is claimed that the defendant failed to make a settlement of his guardianship, and failed to account for and pay to her the money which came into his hands; that there is a balance due her of between one hundred and two hundred dollars. The evidence shows that a settlement was made with the court, but the record thereof is somewhat informal. This suit was not commenced for more than twenty years after the

plaintiff became of age. It is barred by the statute of limitations. The evidence does not show that the defendant practiced any fraud or made any fraudulent concealment of the state of his account, but it does show that the plaintiff, with the least degree of diligence, might have ascertained all of the facts now relied upon many years ago. The case demands no further attention. AFFIRMED.

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## GEORGE R. PEARSONS, Guardian, Appellee, v. AMERICAN INVESTMENT COMPANY, Appellant.

**Tax Sale:** MINOR'S RIGHT OF REDEMPTION. A quitclaim deed to the guardian of a minor from one who held the property conveyed as trustee for the minor's father will not entitle such guardian to redeem from a tax sale of the property conveyed, where the guardian, in his capacity of administrator of the father's estate, has previously contracted a sale of the same lands to a creditor of the father's estate.

*Appeal from Clay District Court.*—HON. LOT THOMAS, Judge.

SATURDAY, OCTOBER 10, 1891.

THIS is an action in equity, by which it is sought to redeem certain real estate from a sale for taxes. The ground of the plaintiff's claim is that he is the legal guardian of Charles B. Smeltzer, a minor, and that his said ward is the owner of the land, and has the right of redemption by reason of his minority. The cause was fully tried on its merits, and there was a decree for the plaintiff. The defendant appeals.—*Reversed.*

*Soper & Allen*, for appellant.

*Parker & Richardson*, for appellee.

ROTHROCK, J.—I. The cause was submitted to the court upon an agreed statement of facts, and upon brief oral testimony by one witness. The agreed statement made reference to certain deeds and other exhibits, which it was stipulated should be taken up and attached as evidence in case either party should appeal to this court. The appellant prepared an abstract, and presented a printed argument. Afterwards the appellee, in connection with an argument, presented an abstract in which it is claimed that the record made by the appellant in this court is not such as to authorize a trial *de novo*. The appellant, by an additional abstract in reply, claims that the record is complete. We think this claim is well founded. It appears that soon after the objection to the record was made the appellant caused proper corrections to be made, and we think there is now no valid objection to a trial anew.

II. It is not denied that the plaintiff's ward, Charles B. Smeltzer, was a minor at the time the action was commenced. The ultimate question to be determined is, was the said Charles B. Smeltzer the owner of the land in controversy at the time of the tax sale, and has he continued to be such owner until the commencement of this suit? It is provided by section 892 of the Code that, "if real property of any minor or lunatic is sold for taxes, the same may be redeemed at any time within one year after such disability is removed. * * *" And under this provision of the law the minor must be the owner of the lands sold for taxes at the time of such sale, to be entitled to an extension of the time of redemption beyond the three years provided for in other cases of sales for taxes. *Burton v. Hintrager*, 18 Iowa, 348. It was incumbent on the plaintiff to show, as an affirmative fact, that his ward, Charles B. Smeltzer, was the owner of the land at and after the tax sale. The facts in connection with the ownership of the land are briefly as follows:

Charles C. Smeltzer was the owner of a large quantity of land in Clay and other counties in that part of the state. He also owned a valuable homestead in the city of Ft. Dodge. He died, leaving the said Charles B. Smeltzer his only heir. The estate was largely involved in debt, and the plaintiff Pearsons, as administrator and guardian, attempted to save the homestead for his ward.

The lands in controversy were owned by Charles C. Smeltzer, and no conveyance thereof was made by him at any time. If he had any interest therein at the time of his death, it descended to his said son. The plaintiff's claim of ownership is based on a quitclaim deed of the land from one Beecher. Beecher's claim to the land was founded upon a tax-sale deed, dated June 30, 1877. The quitclaim deed was executed September 17, 1877. It is strenuously contended in behalf of the appellee that, as the tax-sale deed to Beecher was presumptive evidence of title in him, it follows that the quitclaim deed conveyed that title to the plaintiff, and that he is, therefore, entitled to redeem. If this were all the evidence of title, or, rather, if there were no other facts in the case inconsistent with this presumption, the claim of the appellee would no doubt be valid. But the quitclaim deed is a peculiar instrument. It is in the following words:

"*Know All Men by These Presents*: That we, Hezekiah Beecher and Pauline E. Beecher, husband and wife, of the county of Webster, Iowa, in consideration of the sum of one dollar ($1) in hand paid, do hereby quitclaim unto George R. Pearsons, guardian of Charles B. Smeltzer, minor, of Webster county, state of Iowa, all our right, title and interest in and to the following described lands, to-wit, * * * lots two, three, four and seven (2, 3, 4, 7), in section seventeen (17), township ninety-seven (97), range thirty-five (35), west; * * * the total of said land

amounting to sixty-eight hundred and seventy-six and eighty-eight-hundredths acres, according to the government survey, be the same more or less. And the said Pauline E. Beecher hereby relinquishes her right of dower in and to the above and foregoing tracts of land, as described, the same having been held in trust.

"[Signed] HEZEKIAH BEECHER,
"PAULINE E. BEECHER."

Duly acknowledged.

It appears from this deed that the land in question, with a large quantity of other land, was held in trust by Beecher for some one; and the consideration named imports that he had no real interest in the land. Again, it appears from the testimony of the plaintiff, as a witness in the case, that Beecher had no interest in the land. The following is the language of the witness: "This deed was made at my request, as Beecher had no valid right to the property." As further impeaching not only any claim of Beecher to the property, but as showing that all the interest which Charles B. Smeltzer at any time had therein was such only as he inherited from his father, it appears in evidence that Pearsons, the plaintiff, as administrator of the estate of Charles C. Smeltzer, and as guardian of Charles B. Smeltzer, made a contract with one Grant, who was a creditor of the estate, by which Grant was to take all of the land belonging to the estate, in consideration that the homestead should be saved and descend unincumbered to said Charles B. Smeltzer. This contract was presented to the circuit court in a proceeding based thereon, in which proceeding Charles B. Smeltzer was made a party, and the court approved the contract, and ordered it to be performed, and it was performed by Grant, and he thereby became entitled to the land in controversy. These facts are not disputed. In our judgment, they are sufficient to rebut the pre-

sumption that the tax deed to Beecher conveyed an independent title to the land. It is not claimed that the order confirming the contract with Grant was void. He states in his testimony that he does not remember "why said real property was not conveyed to William M. Grant pursuant to the contract made by me as administrator and guardian."

Our conclusion is that the court below should have found that the evidence did not show that Charles B. Smeltzer was the owner of the land, and entitled to redeem from the subsequent tax sale under which the defendant claims, and the decree will be REVERSED.

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## JENNIE A. McCREARY, Appellee, v. D. H. SKINNER, Sheriff, etc., *et al.*, Appellants.

**Fraudulent Conveyances**: MORTGAGE TAKEN IN PART TO HINDER CREDITORS: GENERAL VERDICT INCONSISTENT WITH SPECIAL FINDING AND ADMISSIONS IN EVIDENCE. The plaintiff's husband being the owner of a stock of merchandise, and being indebted to divers persons, gave to the plaintiff a mortgage on said property as security for an indebtedness to her originating more than twenty years previous. In an action for conversion against the defendant, who had seized the mortgaged property under a writ of attachment in favor of another creditor of the husband, the plaintiff testified that her purpose in taking the mortgage was partly to prevent other creditors from taking the goods. The jury returned special findings to the effect that the mortgagor was insolvent when the mortgage was executed, that he was being pressed by creditors at the time, that it was because he was so pressed that he and the plaintiff talked of putting the mortgage on the property in controversy, that prior to this time the plaintiff had never made any demand of her husband for either payment or security, nor had received any written evidence of the indebtedness, that with the consent of the plaintiff the mortgagor gave another mortgage on the same property, prior to the plaintiff's mortgage, to one M., to secure him for services he might render in the future as an attorney, in the event that the plaintiff's mortgage was attacked by creditors, and that these two mortgages

covered all of the husband's property. *Held*, that these special findings taken in connection with the admissions of the plaintiff in evidence showed that the plaintiff's mortgage was taken in part to hinder or delay creditors, and being inconsistent with a special finding that the mortgage was taken without any fraudulent intent, and a general verdict in favor of the plaintiff, the defendant's motion for judgment, notwithstanding the verdict of the jury, should have been sustained.

*Appeal from Page District Court.*—HON. A. B. THORNELL, Judge.

SATURDAY, OCTOBER 10, 1891.

ACTION to recover a certain stock of goods. There was a judgment for the plaintiff, from which the defendants appeal.—*Reversed.*

*T. E. Clark* and *Nathaniel B. Raymond*, for appellants.

*W. W. Morsman*, for appellee.

GRANGER, J.—The plaintiff is the wife of A. B. McCreary, who in February, 1886, was the owner of a stock of merchandise consisting of books, stationery, wallpaper, watches, jewelry, silverware, etc., and on the twenty-second of that month he made to the plaintiff a chattel mortgage thereon, to secure the sum of eight hundred and seventy-three dollars and thirty-two cents, due in six months. The mortgage, by its terms, gave to the mortgagor the right to sell, in the usual course of trade, from the stock, and from the proceeds of the sales to keep the stock at the present value; the mortgage to cover the additions thereto. Redhead, Norton, Lathrop & Co. was an attaching creditor of A. B. McCreary, and in March, 1886, by virtue of an attachment, seized, the stock of goods thus mortgaged, and the issues in this case involve the validity of the plaintiff's mortgage, the defendants' contention being that it is void as in fraud of creditors; and they rely

upon the admissions of the plaintiff in evidence, and the following special findings of the jury, to sustain their position, upon which they moved the court for a judgment in their favor, notwithstanding the general verdict:

"*First.* Was A. B. McCreary at the time of the execution of plaintiff's mortgage, on or about February 22, 1886, insolvent? *A.* Yes.

"*Second.* Was A. B. McCreary at the time of the execution of plaintiff's mortgage, on or about February 22, 1886, and for some time prior thereto, being pressed by creditors for the collection of their claims? *A.* Yes.

"*Third.* Was it because A. B. McCreary was being pressed by his creditors that he and the plaintiff first talked of putting the mortgage in controversy on his stock of goods, attached by defendants? *A.* Yes.

"*Fourth.* Did A. B. McCreary, with the consent of plaintiff, place a mortgage upon the property in controversy prior to plaintiff's mortgage, to secure a note of one hundred dollars to S. C. McPherrin, on account of services which he was to render in the future as an attorney, in the event that plaintiff's mortgage was attacked by creditors? *A.* Yes.

"*Fifth.* Had the plaintiff up to February 22, 1886, ever made any demand of A. B. McCreary for the payment or security of the various loans which she claims formed the consideration for the mortgage in controversy? *A.* No.

"*Sixth.* Had the plaintiff up to February 22, 1886, ever received from A. B. McCreary any written evidence of the indebtedness which she claims was the consideration of the mortgage in controversy? *A.* No.

"*Seventh.* Did plaintiff's mortgage cover all the property owned by A. B. McCreary which was subject to execution? *A.* Yes."

In addition to these findings, the plaintiff testified that her purpose in taking the mortgage was partly to prevent other creditors from taking the goods. In answer to a question if such was not her purpose, she answered, "Partly." This, with the answers to other questions put to her, admits of but the single conclusion that such was her purpose. The debt for which the mortgage was given was more than twenty years old, and consisted of money loaned to her husband, to be paid whenever she should want it to procure her a home, and no written evidence of the debt was ever given till 1886, when the mortgage in question was executed. The record, independent of her admissions as to her purpose, is a feeble showing of good faith, but with the findings and the admissions we think the motion for judgment for the defendants should have been sustained. It is true that the jury returned other findings, to the effect that the mortgage was not taken with a fraudulent intent, but the difficulty with these findings is they override the admissions of the plaintiff against herself, which are to be taken as true.

There is an attempt in argument to show that the admissions made on the cross-examinations should not prevail against other statements made by the plaintiff in her testimony. On the direct examination she said: "I had no other object in taking that mortgage besides the security for my note." Much reliance is placed on this statement to bring the point within the rule that the question of fact as to a fraudulent intent is one for the jury. It is to be borne in mind that the plaintiff is a witness in her own behalf, and that statements or admissions deliberately made against her interest are to be taken as true, and we are to determine from her entire evidence if the statement that her motive in taking the mortgage was in part to hinder and delay creditors was intentionally made, and of that we think there can be no doubt. The cross-examination was

quite thorough, and her attention was in many ways drawn to the importance of that particular point in the case; and indirectly, in different ways, she gave expression to the same conclusion, as that she believed it was "the reading of the mortgage" that she was to "let the mortgage stand until somebody else troubled him;" that she said when the mortgage was taken that he was to go on with his business until she "saw he was going to have business trouble," and that she intended to keep the creditors off "if he could go on with his business." It unquestionably appears that she and her husband thought when the mortgage was given that its validity would be tested by the creditors, and she consented that a prior mortgage for one hundred dollars might be placed on the stock, to secure an attorney's fee for services to be performed in resisting the creditors of her husband in an effort to set aside the mortgage. Taken together, the testimony clearly imports an intent on her part to admit that her purpose was in part to aid her husband in preventing his creditors from securing their pay from the stock of goods, which was all the property he possessed. The legal conclusion, then, from the finding by the jury and the admissions by the plaintiff, is that the mortgage as to creditors is void. See, on this point: *Davenport v. Cummings*, 15 Iowa, 219; *Wilson v. Horr*, 15 Iowa, 489; *Chapel v. Clapp*, 29 Iowa, 191; *Chapman v. Ransom*, 44 Iowa, 377; *Kohn v. Clement*, 58 Iowa, 589; *Craig v. Fowler*, 59 Iowa, 200; *Headington v. Langland*, 65 Iowa, 276; *Crawford v. Nolan*, 70 Iowa, 97.

With these views, the motion by the defendants for judgment should have been sustained, and the cause is remanded to the district court for that purpose. REVERSED.

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# PETRONELLA ERICKSON, Appellee, v. BARBER BROS. *et al.*, Appellants.

1. **Practice:** DISTRICT COURT RULES: TRIAL NOTICES: CAUSES CONTINUED BEFORE ANSWER. District court rule number 2, requiring that parties desiring to bring a cause, once continued, on for trial shall file with the clerk a notice of trial at least ten days before the term, is not applicable to cases continued before answer is filed.

2. **Negligence:** PERSONAL INJURY: TESTIMONY OF PHYSICIAN. In an action to recover damages on account of injuries sustained through the negligence of the defendant, it is competent for a physician, who has treated the plaintiff for such injuries, to testify as to the location thereof, whether they have been recovered from, and, if not, whether that fact would indicate that the injuries were permanent.

3. ———: ———: LIVERYMEN: DEFECTIVE APPLIANCES: EVIDENCE. The plaintiff employed the defendant, who was a liveryman, to convey her to a place named, and claimed that in the course of the journey she was thrown from the wagon employed for that purpose by reason of a defective fastening, which was designed to secure the seat which she occupied to the bed of the wagon. *Held*, that witnesses who did not see the fastening at the time of the accident, but who saw it when it was in the same condition as when the plaintiff was injured, were properly allowed to testify as to its condition.

4. ———: ———: ———: INSTRUCTIONS TO JURY. It being the theory of the plaintiff that the defendant was a common carrier when employed by her, she sought to prove such fact by introducing in evidence, against the objection of the defendants, the latter's advertisement in a local newspaper as liverymen. *Held*, that the court properly refused to instruct the jury, at the request of the defendants, that "the fact that the defendants were liverymen cut no figure in the case."

5. **Practice in Supreme Court:** VERDICT: EVIDENCE. Where the evidence is so conflicting that the jury might well have found a verdict in favor of either party, the verdict of the jury will not be disturbed upon appeal.

*Appeal from Hancock District Court.*—HON. G. W. RUDDICK, Judge.

SATURDAY, OCTOBER 10, 1891.

ACTION to recover damages on account of personal injuries sustained by the plaintiff, and alleged to have been caused by the negligence of the defendants. There was a trial by jury, and a judgment in favor of the plaintiff. The defendants appeal.—*Affirmed.*

*W. E. Bradford*, for appellants.

*Ripley & Osborne* and *Wesley Aldridge*, for appellee.

ROBINSON, J.—The defendants, at the time of the transactions in question, were engaged at Britt, as liverymen, in carrying passengers for hire. In May, 1889, the plaintiff engaged the defendants to convey her from Britt to a place in the country, several miles distant. An open, two-seated buggy was selected. The plaintiff occupied a part of the rear seat, one of the defendants acting as driver, and the journey was commenced. Before it was completed, in crossing a small culvert, the plaintiff was thrown from the buggy, and received the injuries of which she complains. She alleges that the defendants were negligent in not providing a safe vehicle, in that the seat she occupied was not properly fastened, and in not driving the team properly. The answer contains a general denial, and alleges that the plaintiff contributed to the injuries in question by her own negligence. The jury returned a verdict in favor of the plaintiff for eight hundred dollars. On the hearing of a motion for a new trial, the district court ordered that it be sustained unless the plaintiff should consent to a reduction of the amount of her recovery to five hundred dollars. The plaintiff thereupon consented to such reduction, and judgment was then entered in her favor for five hundred dollars and costs.

I. The petition in this case was filed in September, 1889. At the October term of court of that year the defendant appeared, and filed motions to strike from the petition and for a more specific statement. The motions were sustained, and an amendment to the petition was filed. The cause was then continued, with leave to the defendants to answer by the first day of the next December term. The answer was filed in vacation, more than ten days before the December term. Rule 2 of the rules of practice, adopted by the convention of district judges held pursuant to the requirements of section 11, chapter 134, Acts of the Twenty-first General Assembly, is as follows:

1. PRACTICE: district court rules: trial notices: causes continued before answer.

"In any case, once continued, where an answer is on file, either party desiring to bring such cause on for trial at any time shall, at least ten days before such term, file with the clerk a notice of trial, and no such cause shall stand for trial unless a trial notice be so filed, except by consent of parties: provided, that, after the commencement of the term, the court may, in its discretion, by order entered of record, permit notices of trial to be entered in the same manner, ten days prior to such date as the court may name in such order. Such order may be general, and not entered of record in each particular case; and the clerk, in preparing the court calendars, shall note thereon, opposite the title of each cause noticed for trial, 'For trial,' which words shall also appear on the printed calendar. This rule shall not apply to appearance or criminal cases, nor to proceedings in probate."

In this case no trial notice was ever filed, and for that reason the defendants objected to going to trial at the December term. The objection was overruled, and the defendants were compelled to go to trial at that term. They now complain of that ruling, and insist that the

rule quoted applies to all continued cases in which an answer is on file ten days before the next term of court, and that since the answer in this case was on file November 20, 1889, and the first day of the next term of court was on the third day of the next month, they were entitled to a trial notice, and could not be compelled, lawfully, to go to trial without it. The rule does not apply to any case at the term at which the defendant is first required to appear, yet, under the rules of practice in force in this state, the parties to all, excepting some equitable actions, are entitled to have the issues settled and the cause tried at the appearance term, unless grounds for a continuance exist. Code, secs. 2635, 2636, 2691, 2744, 2745. When a case has been continued before the issues are settled, there is no more reason for requiring a trial notice than there is to require such a notice before the appearance term. It is a matter of common knowledge that many cases are continued from term to term after the issues are settled, the parties in interest not caring to have them tried. In such a case, both parties having consented to a continuance, it is just that either one who wishes a trial shall give notice of that fact. We think the rule under consideration was adopted largely on account of cases of that kind, although its language is so broad as to include others. In a very large proportion, and in probably a majority, of cases, the issues are joined by petition and answer. In a large share of the cases in which that is not true, the filing of the answer informs the plaintiff of the defenses he is to meet. In view of these facts, and of the rights of the parties at the appearance term, and the practice of continuing cases by agreement to which we have referred, we think the words, "where an answer is filed," refer to the condition of the case at the time of the continuance, and that the rule does not apply to a case in which the answer was filed after the continuance was had. We

conclude, therefore, that a trial notice was not required in this case, and that it was properly set down for trial at the December term.

II. There was evidence which tended to show that the plaintiff was injured in the back and hips by the accident of which she complains. The physician who treated her was asked if she had sustained such injuries, and had not, at the time of the trial, recovered from them, whether that fact would be any indication that the injuries were permanent. We think he was properly permitted to answer the question. He knew the age and condition of the plaintiff, and was qualified to express an opinion as to the extent of her injuries, and the time required for her to recover from them, if they were of a transient nature, and what her failure to recover from them during the time which had elapsed when he testified would indicate, if anything, as to their character.

2. NEGLIGENCE: personal injury: testimony of physician.

III. The plaintiff claims that she was thrown from the buggy in part by reason of a defective fastening, which was designed to secure the seat which she occupied, to the bed of the buggy. The jolt, caused by crossing the culvert, when the accident occurred, threw the seat out, and it is claimed by the plaintiff that, had the seat been properly secured, the accident would not have happened. The appellants complain of certain testimony, given on the part of the plaintiff, to show the condition of the fastening, on the ground that the witnesses did not see the fastening at the time of the accident, and, therefore, could not have known its condition at that time. But there was evidence which tended to show that the fastening was in the same condition at the time of the accident that it was when it was observed by the witnesses, and their testimony was, therefore, properly admitted.

3. —: —: liverymen: defective appliances: evidence.

IV. The petition was drawn, and the trial of the case was for a time conducted by the plaintiff, on the theory that the defendants were common carriers when engaged by her. In an amendment to the petition, it is alleged that the defendants were common carriers at that time. For the purpose of showing that the defendants were common carriers, as charged, the plaintiff was permitted, against the objections of the defendants, to introduce in evidence an advertisement which they had inserted in a paper published at Britt, in which their name was given, and their business as keepers of a livery, sale and feed stable at Britt was indicated. The advertisement also contained the following: "First-class accommodations. Careful drivers furnished when desired. Give us a call." The defendants asked the court to instruct the jury as follows: "1. The fact that defendants were liverymen cuts no figure in this case. They were not common carriers of passengers, like a railway or stage-coach line." The instruction was refused, and of that refusal, and of the failure of the court to instruct the jury in regard to common carriers, the defendants complain. It cannot be said that the fact that the defendants were liverymen "cuts no figure in the case." Even though their liability was not that of common carriers, yet the fact that they engaged as liverymen to carry the plaintiff to her destination, for hire, created an obligation of care and diligence on their part, greater than might have existed under other circumstances. The court did not charge the jury that the defendants would be liable as common carriers, but that they were required to use ordinary care and diligence in discharging their obligations to the plaintiff, including ordinary care and skill in driving the team. The rule, as announced to the jury, was as favorable to the defendants as they were entitled to have it stated, and we do not understand that they complain of it.

4. —: —: —: instructions to jury.

Since the jury were correctly instructed as to what facts must have been proven to entitle the plaintiff to recover, it was not necessary to instruct them in regard to a degree of liability not really involved in the case. Under the charge as given, the defendants could not have been prejudiced by the fact that the court did not instruct in regard to their liability as common carriers, averred in the petition, and the statement of the plaintiff, in offering the advertisement, that it was designed to show that they were common carriers. Those matters were necessarily as much eliminated from the case by the charge given as they would have been had the court referred to them specifically.

V. The appellants criticise portions of the charge, and complain of rulings in regard to the admission of evidence, and in refusing to give instructions asked. None of the questions thus presented are of sufficient importance to justify a separate discussion of them. We do not think any of the objections of the appellants are well founded. There was much conflict in the evidence, and the jury might well have returned a verdict in favor of the defendants. But, in our opinion, there is sufficient evidence to sustain the verdict rendered. The court did not err in its rulings as to the proper elements of damage involved in the case, and its charge to the jury was fair to the defendants.

5. PRACTICE in supreme court: verdict: evidence:

We discover no error which would justify a reversal of the judgment of the district court. It is, therefore, AFFIRMED.

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## EDWARD F. BULLARD, Appellant, v. B. F. HARKNESS, Appellee.

1. **Injunction**: BOND: DAMAGES: EXPENSES. In an action brought by the defendant to enjoin an execution sale of certain lands and to

quiet his title thereto, the injunction was, upon final hearing, dissolved, and the defendant held to hold the land in trust for the plaintiff herein. *Held*, in an action upon the injunction bond that the plaintiff was not entitled to recover as damages the costs and expenses incurred in obtaining the dissolution of said injunction.

2. ———: ———: USE OF LAND. The value of the use of the land in such case for the time that the plaintiff was kept out of possession being contingent upon the result of said execution sale, *held*, not to be recoverable as damages.

3. ———: ———: ———. The cost of publication of the notice of said execution sale having been incurred in part for other lands, and it not appearing what part of such expense was on account of the lands in controversy, and said sale as to the latter lands being unnecessary, *held*, that the plaintiff was not entitled to recover such costs.

*Appeal from Humboldt District Court.*—HON. GEORGE H. CARR, Judge.

SATURDAY, OCTOBER 10, 1891.

THIS is an action upon an injunction bond. There was an answer denying generally, and setting up a counterclaim, to which a reply was filed denying the same. A trial was had to the court resulting in a judgment dismissing the plaintiff's petition, and in favor of the defendants on the counterclaim. The plaintiff appeals.—*Affirmed.*

*E. F. Bullard*, for appellant.

*A. E. Clark*, for appellees.

GIVEN, J.—I. The appellant, having a judgment and decree of foreclosure against certain lands, was proceeding to sell the same on special execution. The appellee Prouty, claiming to be the owner of the lands under a tax deed, brought an action to enjoin the sale and to quiet his title, and, to procure the issuance of the injunction, executed the bond sued upon, with the appellee Harkness, as his surety. On final hearing it was

1. INJUNCTION: bond: damages: expenses.

decreed that the appellee Prouty held the lands as trustee for the appellant, that the injunction be dissolved, and that the appellee convey the land to the appellant. The appellant asks to recover on the bond costs and expenses alleged to have been incurred in obtaining a dissolution of the injunction; the value of the use of the land, or interest on the amount at which the appellant would have bid it off, and ten dollars and sixty cents paid for advertising the sale. The appellant assigns as errors the exclusion of these claims for damages.

There was no direct attack made against the injunction. It was left to stand or fall upon the question of ownership; and, Prouty's title being found to be that of a trustee for the appellant, the injunction was dissolved. The costs and expenses incurred by the appellant were in trying the issue of ownership, and are not different from what they would have been if no injunction had been issued. It is only such expenditures as were necessarily incurred in defending against the injunction that are recoverable on the bond, and expenses incurred in defending against other features of the case in which the injunction was issued are not included. When an injunction is the only relief sought, and dissolution is procured on final hearing, necessary costs and expenses in procuring the dissolution are recoverable. *Behrens v. McKenzie*, 23 Iowa, 333; *Langworthy v. McKelvey*, 25 Iowa, 48; *Reece v. Northway*, 58 Iowa, 187; *Ford v. Loomis*, 62 Iowa, 586; *Thomas v. McDaneld*, 77 Iowa, 300. When the injunction is merely auxiliary, expenses incurred in defending the action are not recoverable. *Carroll Co. v. Land Co.*, 53 Iowa, 685. The appellant relies upon *Thomas v. McDaneld*, *supra*. While there is a similarity in the facts, there is this controlling distinction: In that case the only relief asked was to enjoin the

sale. "Strike the prayer for injunction and the allegations upon which it was asked from the petition, and there is no case left." Not so, however, in this case, as the appellee Prouty's claim of ownership and right to be quieted in his title remained to be determined, even though the injunction was dissolved. The injunction was merely auxiliary, and none of the expenses claimed were incurred in procuring its dissolution, and, therefore, are not recoverable on the bond.

II. The appellant asserts that the land was worth sixteen hundred dollars; that, if not restrained, he would have bid it in at that sum, and obtained a sheriff's deed; wherefore he claims to be entitled to the value of the use of the land for the time he was kept out of possession, or interest on the sixteen hundred dollars. As said in *Johnson v. Moser*, 72 Iowa, 654: "It is impossible to know what the result of the sale, if made, would have been. It is possible the property might have been sold to some person other than the plaintiff." True it did not appear in that case, as in this, that the judgment debtor was insolvent, and the mortgaged property insufficient to pay the debt; but that does not change the fact that the damages claimed depended upon contingencies the result of which cannot be known. There was no error in excluding this claim.

2. —: —: use of land.

III. The appellant expended ten dollars and sixty cents for publishing the notice of the sheriff's sale. Other lands than those the sale of which was enjoined were included in the notice, and there is nothing to show what part of the expense related to the lands included in the injunction. According to the decree, the appellant was the owner of the lands, and, therefore, the action to foreclose his mortgage was unnecessary. The contention was whether the defendant Prouty held the tax title in his own right or in trust for the appellant,

3. —: —: —.

and the injunction was merely for the purpose of preventing further complications by a sale until the question of ownership was determined. We find no error in excluding these claims for damages.

IV. The court allowed the defendant Prouty on his counterclaim for services rendered for the appellant in the condemnation of a right of way across the land, and for taxes paid on the land. We see no error in making these allowances.

The judgment of the district court is AFFIRMED.

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## MANSON LOAN & TRUST COMPANY, Appellee, v. H. W. HESTON *et al.*, Appellants.

**Taxation:** GENERAL INCREASE OF ASSESSMENT BY BOARD OF EQUALIZATION. Where, pursuant to the order of the board of supervisors, the different classes of property in a county have been assessed at a valuation of a uniform per centum of the actual cash value, the supervisors cannot afterwards, when sitting as a board of equalization, make a general increase in the assessment of a particular class of property, so as to make the per centum of the valuation of such class greater than the per centum of valuation of any other class.

*Appeal from Calhoun District Court.*—HON. J. P. CONNOR, Judge.

MONDAY, OCTOBER 12, 1891.

CERTIORARI to declare invalid the action of the supervisors of the county, as a board of equalization, in raising the assessments of moneys and credits made against the plaintiffs. The district court adjudged that the action of the defendants complained of is illegal, and without authority of law, and, therefore, null and void. The defendants appeal.—*Affirmed.*

*E. C. Stevenson* and *J. C. Kerr*, for appellants.

*O. J. Jolley*, for appellee.

BECK, C. J.—I. The undisputed facts of the case are these: The board of supervisors, pursuant to the requirements of Code, section 821, made a classification of the assessable property of the county, specifically designating certain classes of property and the values to be assessed thereon, and entered an order that "all other property, not herein enumerated, the assessors shall assess according to value, in proportion to the foregoing valuation, which is based upon fifty per cent. of actual cash value." In obedience to this order, the assessors assessed the plaintiffs, respectively, upon money and credits, in a sum specified as to each. Subsequently the supervisors, acting as a board of equalization, for the alleged purpose of equalizing the taxes, ordered, among other changes in the assessments, that fifty per centum be added to all assessments upon moneys and credits in all of the townships. There were various changes made in the assessments of other classes of property, in some instances increasing and in others diminishing the assessed value; but it does not appear that there was any purpose or effort to increase the assessment of any other classes of property beyond fifty per centum of the actual cash value thereof, which the board of supervisors fixed as the rate of assessment, and which we must presume was obeyed by the assessors, and all assessments for money and credits in each township were upon fifty percentum of the value thereof.

II. The action of the board of equalization in increasing the assessments upon money and credits did not, and could not, equalize the assessments upon that class of property; for it was equally assessed in each township. Neither could that action have effected an

equalization of the taxes as between other classes of property and moneys and credits, for, as we have shown, we must presume the other classes were assessed at fifty per centum of their actual value, and, as is shown by the record, moneys and credits were assessed at the same rate. The assessments as to the various classes, including moneys and credits, were equal until the change by the board of equalization made an inequality by adding to the assessments of moneys and credits fifty per centum. The action of the board of equalization could not have been had with the purpose of equalizing an inequality, for none existed; but it was clearly had, if not for the express purpose, surely with the certain result, plainly to be foreseen, of creating an inequality in the assessments on money and credits when compared with other classes of property.

III. The jurisdiction of the board of equalization extends no further than to authorize it to equalize assessments. It did not authorize the changing of the assessment roll so as to cause inequalities. Its act, therefore, in increasing the assessments of the plaintiffs, was illegal, and beyond its jurisdiction, and must be declared void. It is not a case in which the board erred in the exercise of its lawful discretion, for, as we have said, it had no jurisdiction to do any act the necessary result of which would cause inequality as to the assessments of various classes of property, and could exercise no discretion leading to that result.

IV. Counsel for the plaintiffs insist that the change in the assessment operated to add to the assessment roll property not before assessed. This is probably not a correct view. The assessment represented the value of the property assessed. Money and credits were, under the order of the board, assessed at fifty per centum of their actual value, so that an assessment of five hundred dollars was in fact upon one thousand dollars of money. The addition of fifty per cent. to

the assessment did not increase the money assessed, but only increased its assessable value. But whether this view or the view of counsel be correct, it is very plain that the addition of the fifty per centum to the assessment of the plaintiffs on moneys and credits created an inequality where none before existed, or, if an inequality did exist, it was increased by the unlawful acts of the board of equalization complained of by the plaintiffs.

The disposition we make of this case renders the consideration of a motion to affirm unnecessary. The decision of the district court is AFFIRMED.

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## LENA SCAGEL, Administratrix, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

1. **Railroads**: NEGLIGENCE: PERSONAL INJURY: EVIDENCE: OPINIONS. In an action against a railroad company to recover damages for the death of one of the defendant's engineers, caused by the derailment of the train upon which such engineer was employed, it appeared that the ice in a stream crossed by defendant's road, and at the point where the accident occurred, had so lodged against the bridge crossing said stream, and against and upon the approach thereto, as that when struck by the engine the rails on the approach on one side were loosened for some distance, and the engine and cars were derailed. *Held*, that the question, put to a witness who visited the place four or five hours after the accident occurred, whether any ice that was there appeared to have been struck by the engine, was not objectionable as calling for an opinion.

2. ———: ———: ———: ———. A witness having testified as to the relative height of the defendant's track at the place of the accident, and on the main bridge, *held*, that for the purpose of showing what the grade was at the time of the accident, and the judgment and recollection of the witness concerning it, he was properly permitted to testify that since the accident the grade of the defendant's road at that point had been raised about one foot.

3. ———: ———: ———: ———: LIFE TABLES. Johnson's New Universal Encyclopedia, being a standard work upon matters of science and art, is competent as evidence of the Northampton and American life tables, for the purpose of showing the expectation of life of an individual.

4. ———: ———: ———: SPECIAL FINDINGS. A party is not entitled upon the trial of a cause, to have interrogatories submitted to the jury for its special findings as to facts that are immaterial, nor upon every circumstance which may have some bearing on his case, and the refusal of the court to submit an interrogatory, the answer to which could not have controlled the general verdict, is not a reversible error.

5. ———: ———: ———: ———: EVIDENCE. There being evidence tending to show that a large part of the railroad ties at the place of the accident were of soft wood, and broken off at the south rail of the defendant's road, and that the ends of others were "combed out" by the spikes which were forced through them by lateral pressure, *held*, that the jury was warranted in finding that the train was *supposed* to have been derailed by coming in contact with ice, and the giving away of the ties, and that the use of the word supposed was not objectionable.

6. ———: ———: ———: ———. It appearing that when the defendant's section foreman examined the bridges a few hours before the accident the river was then rising rapidly, that the stream was accustomed to rise rapidly, and had been as high several times before since the defendant's railway had been constructed, and that twelve or fifteen years before the track at the same point had been washed out, *held*, that the finding of the jury that the defendant was guilty of the want of ordinary care in patrolling its track was supported by the evidence.

7. ———: ———: ———: ———. A rule of the defendant company required its engineers, during heavy rainstorms, or immediately thereafter, to run its trains "very cautiously," and one of the questions submitted to the jury for their special finding was, whether the deceased was running the engine "very cautiously" at the time it came in contact with the ice. *Held*, that it appearing from the evidence that the rain had ceased several hours before the deceased reached the place of the accident, the interrogatory related to an immaterial fact; but that, conceding that the rule was applicable to the case, the same called for the exercise only of reasonable care under the circumstances referred to therein, and the answer of the jury that the deceased was running "reasonably precautious," was sufficiently definite as to its meaning, and was not irresponsive to the question as referring to a different degree of care from that called for by the above rule.

8. ———: ———: ———: VERDICT: EVIDENCE. The evidence tended to show a faulty construction of the defendant's roadbed at the place

of the accident, that many of the ties were in bad condition, and not suitable for use, and that the provision for the passage of water under the bridge was insufficient; that the deceased had not been informed of anything that required unusual care at the place of the accident, though he had been warned to guard against danger at two other places; that he seemed to have managed his engine with reasonable care; that before the place of the accident was reached the deceased had applied the airbrakes, but had released them when the level track, within a short distance of the bridge, was reached; that he was in his proper place, looking ahead, when the accident occurred, but a fog prevented him from seeing the ice on the track until too late to check the train, and avoid the collision in which he was killed. *Held*, that the jury were justified in returning a verdict against the defendant for damages for the death of the engineer.

*Appeal from Cerro Gordo District Court.*—HON. J. C. SHERWIN, Judge.

MONDAY, OCTOBER 12, 1891.

ACTION to recover damages alleged to have resulted from the negligence of the defendant in causing the death of the plaintiff's intestate. There was a trial by jury, resulting in a verdict and judgment in favor of the plaintiff for sixty-five hundred dollars. The defendant appeals.—*Affirmed.*

*Geo. E. Clarke*, for appellant.

*Stanberry & Clark* and *John Cliggit*, for appellee.

ROBINSON, J.—In April, 1888, James W. Scagel was in the employment of the defendant as engineer of a passenger locomotive. His run was from Mason City to McGregor and back. He left McGregor with his engine and train a few minutes before midnight on the fourth day of the month named. It had been raining hard, and he was warned to run slowly over all bad places in the road, without regard to making time. His attention was called especially to a place east of and near Ft. Atkinson, and to another called "Plum

Creek," two or three miles west of Lawler. The train passed these places safely, but when it approached the crossing of a stream called the "Middle" or "Little" Wapsie the engine came in contact with ice which had floated or been forced onto the rails, and was thrown from the track, several cars were derailed, Scagel and others were killed, and several were injured.

The plaintiff alleges that the accident was caused by the negligence of the defendant in not constructing its railway and appurtenances properly, in not keeping them in repair, and in not having the place where the accident occurred watched, and the employes in charge of the train which was wrecked notified of its condition. The defendant denies the alleged negligence, avers that the decedent contributed to the cause of his death by his own carelessness, and that he knew of the alleged defects in its railway.

There is some conflict in the evidence, but it tends to show facts substantially as follows: The ground on the east side of the Middle Wapsie or Wapsie, as it is commonly called in the record, is low, and the defendant's track is carried across it on embankments and trestlework. Near the eastern side of the bottom land is a trestlework called the "Dry" or "East" bridge. It was about five feet above the surface of the ground, and had a clear opening for the passage of water a little more than forty feet in width. That bridge had at one time been much longer, but in the year 1887 a portion of it was filled with an embankment of earth. From that bridge westward towards the stream an embankment extended for a distance of eight hundred and forty-four feet. At the west end of that embankment was the bridge over the Wapsie, which was one hundred and seventy-four feet in length, with an opening under it for the passage of water, one hundred and sixty-three feet wide. The west bridge was several feet higher than the east one. The accident occurred two hundred

and twenty feet west of the Dry bridge. The lowest part of the railway track in the vicinity of the river extended from the place of the accident eastward a distance of four or five hundred feet. A short distance north of the track, on the east side of the river, was a pond. At the time of the accident the water had overflowed the banks of the Wapsie, and had raised nearly to the top of the embankment we have described. Ice was floating down from above, and some of it had lodged at the Dry bridge. The flow of the water was so far checked by the bridges, the ice and the embankment that it was several feet higher on the north side of the track than it was on the other. A pear-shaped cake of ice, about two hundred and twenty-five feet long, and about one hundred and seventy-five feet wide at the widest place, and fifteen inches thick, had floated from the north, presumably from the pond mentioned, and the narrow end, which was twelve feet wide, had lodged against the embankment, if it was not actually on the rails. The engine struck some ice, but whether the large cake or smaller pieces is a matter of dispute. The south rails were loosened for some distance, and the engine and the cars which were derailed went off on the south side. Many of the ties at the place of the accident were of soft wood, others were decayed, and in such ties the spikes would not hold.

I. A witness who reached the place of the accident four or five hours after it occurred testified that there were several pieces of ice on the track, and stated, in regard to the cake of ice described, that it lay about a foot from the end of the ties, and that, so far as he was aware, there was no indication that the ice, which was next to the track, had been struck or crushed, or shoved back from the track by the engine or cars. He was then asked. "Did any ice that was there appear to have been struck?" The defendant objected to the

1. RAILROAD: negligence: personal injury: evidence: opinions.

question, on the ground that it was incompetent, immaterial, and called for the opinion and conclusion of the witness. The objection was overruled, and the witness answered: "Only the ice that was on the track under the car; that I spoke of before." The appellant insists that the question called for the opinion of the witness on a material question in the case, *i. e.*, whether the train struck the large cake or smaller pieces which the large one had, perhaps, pushed up onto the track, and that it was not one requiring the testimony of an expert. The information called for by the question was in the nature of a fact of which anyone of ordinary observation who had noticed the condition of the ice was competent to speak, and the answer was, therefore, competent. *Kelleher v. City of Keokuk*, 60 Iowa, 474; *Winter v. Central Iowa Ry. Co.*, 80 Iowa, 443, 446.

II. A witness stated that since the accident the grade of the defendant's road had been raised about one foot at the place where the accident occurred. The defendant objected to the evidence, and moved to exclude it. The motion was denied on the statement of the plaintiff that she desired it to remain only for the purpose of showing what the grade was at the time of the accident, and the judgment and recollection of the witness concerning it. He had testified in regard to the relative height of the track at the place of the accident, and on the main bridge, and we think the question may have been proper for the purpose for which it was retained. Another witness was asked in regard to the raising of the track, but gave no definite answer to the question, and what he said could not have been prejudicial.

2. —: —: —: —.

III. The plaintiff offered in evidence the Northampton and American life tables as shown by volume 3, of Johnson's New Universal Encyclopedia. The defendant objected, on the ground

3. —: —: —: —: life tables.

that it was "incompetent and immaterial," stating that it "knew nothing about the book." The objection was overruled, and the book was admitted in evidence. It is a standard and well-known work, which treats of science and art, as well as other matters, and, under the rule adopted in *Worden v. H. & S. Ry. Co.*, 76 Iowa, 310, 314, and *Haden v. Sioux City & P. Ry. Co.*, 48 N. W. Rep. (Iowa) 733, was admissible. See, also, *Sellars v. Foster*, 42 N. W. Rep. (Neb.) 908; *Cooper v. Lake Shore & M. S. Ry. Co.*, 66 Mich. 261; 33 N. W. Rep. 306. Other questions in regard to the admission of evidence are presented, but we find no error prejudicial to the defendant in any of the rulings of which complaint is made.

IV. When the evidence had been fully introduced, the defendant asked the court to submit to the jury fifteen special interrogatories, of which the court refused to submit those numbered 4, 11, 12 and 13. Of that ruling the appellant complains. Section 2808 of the Code is as follows: "Sec. 2808. In all actions, the jury, in their discretion, may render a general or special verdict, and, in any case in which they render a general verdict, they may be required by the court, and must be so required on the request of any party to the action, to find specially upon any particular questions of fact to be stated to them in writing, which questions of fact shall be submitted to the attorneys of the adverse party before the argument to the jury is commenced." Neither party to an action has a right to insist that all the special interrogatories he may present to the court shall be submitted to the jury. Such interrogatories should be clear and distinct, and capable of being answered briefly. *Marshall v. Blackshire*, 44 Iowa, 476. An interrogatory which refers only to an immaterial fact should not be submitted. *Bonham v. Iowa Central Ins. Co.*, 25 Iowa, 335; *Liston v. Central Iowa Ry. Co.*, 70 Iowa,

4. —: —: —: special finding.

716; *Lawson v. Chicago, R. I. & P. Ry. Co.*, 57 Iowa, 674; *Mickey v. Burlington Ins. Co.*, 35 Iowa, 183. The refusal of the trial court to submit a special interrogatory, the answer to which could not have controlled the general verdict is not reversible error. *Dreher v. I. S. W. Ry. Co.*, 59 Iowa, 601. A party is not entitled to a special finding upon every circumstance which may have some bearing on the case. *Hawley v. Chicago, B. & Q. Ry. Co.*, 71 Iowa, 720.

The fourth special interrogatory asked was as follows: "Had the superintendent of the defendant any reason to anticipate that the large body of ice from the pond would rise and float down against the embankment, and be forced up the slope of the dump, and over the rail?" It is not shown that the ice referred to in the interrogatory was forced over the rail. The appellee contends that it was not, but that smaller pieces of ice were pushed by it over the rail, and the evidence tends to show that such was the fact. But, if the interrogatory had been submitted and answered in the negative, it would have had no effect upon the general verdict. The defendant had other officers and employes whose duty it was to know the condition of the road, and to anticipate and provide against danger which might be reasonably apprehended. One of these was the section foreman, who had charge of the track at the place of the accident, and whose duty it was to go over the section in rainy weather, in the daytime and at night, to ascertain the condition of the track, and guard against accidents. He was at the Wapsie bridges about two hours before the accident. If the condition of the stream and bridges at that time was such that danger to the track, and to the trains moving upon it, was probable, he should have taken steps to prevent accident, and the want of knowledge of the threatened danger on the part of the superintendent would have been immaterial. Moreover, the liability of the defend-

ant did not depend upon a reason known to its superintendent for anticipating that the cake of ice in question would be floated onto its track. That particular result may have been unexpected and unusual, but if it was produced by natural causes, which the defendant, by the exercise of ordinary diligence, could have guarded against, and the decedent was not in fault, it is liable. *Doyle v. Chicago, St. P. & K. C. Ry. Co.*, 77 Iowa, 610.

The eleventh special interrogatory was as follows: "If the deceased had been running his engine very cautiously, could the derailment have been avoided?" The court properly refused to submit this to the jury. It sought to inquire in regard to a mere possibility, and the answer whether in the affirmative or negative would not have controlled the general verdict.

The twelfth special finding assumes as a fact that which is not conceded, and which, we think, was not proven, namely, that the crossing of the Wapsie was attempted immediately after a heavy rain at that place; and the thirteenth special interrogatory is based upon the twelfth. We conclude that the court did not err in refusing to submit the interrogatories we have considered. See *Thomas v. Schee*, 80 Iowa, 242; *Des Moines & D. Land & Tree Co. v. Homestead & Trust Co.*, 82 Iowa, 663.

V. The appellant complains of several of the special findings, and insists that they should have been set aside because not supported by the evidence. The first is as follows: "Was the train derailed by coming in contact with a piece of ice forced up a slope of the dump, and over the north rail of the defendant's railroad track? *A*. Supposed in coming in contact with ice and giving away of ties." We think the answer was authorized. "There was evidence which tended to show that a large proportion of the ties in question were wholly insufficient; that some of them were broken off at the south rail;

5. ——: ——: ——: ——: evidence.

and that the ends of others were "combed out" by the spikes which were forced through them by lateral pressure. It may be, if the ties had been of hard wood and sound, that the rails would have remained in place. The engine might have thrown the ice from the track without serious injury to the train, and the decedent would have escaped injury. If the jury found that such was the case, it followed that the accident was due in part to the ice and in part to the defective ties, and the answer of the jury expressed the fact. It is true they might have answered the interrogatory in the negative, but such an answer would have been misleading. The use of the word "supposed" in the answer is not objectionable. *Martin v. Central Iowa Ry. Co.*, 59 Iowa, 414. The second special finding is disposed of by what we have said in regard to the first.

VI. The third special finding is as follows: "Was the defendant guilty of any want of ordinary care in patrolling its track at the place of the accident? *A.* We think it was." When Jordan, the defendant's section foreman, examined the bridges a few hours before the accident, the river was rising rapidly, and the water was flowing under the Dry bridge. A farmer named Tierney, who lived a short distance north of the bridges, had been so alarmed at ten o'clock the previous evening by the rising water that he caused a son to watch it during the night. The rise was not unprecedented. The stream usually rose rapidly, and had been as high several times before and since the railway of the defendant had been constructed. Twelve or fifteen years before, the track was washed out at the place of the accident. It is not shown that cakes of ice had ever before been floated from the pond, and lodged against the railway, but the defendant was chargeable with knowledge of the fact that, under favorable conditions, that must happen as a natural result of well-

known laws. That being true, the defendant should have guarded against resulting danger. We think the evidence supports the special finding.

VII. The tenth special finding is as follows: "Was the deceased running the engine very cautiously 7. —: —: —: —: —. at the time the engine came in contact with the ice? *A*. We think reasonably precautious." The answer, although not couched in the best language, conveys a definite meaning, which is not questioned. But the appellant complains that the answer is not responsive to the question, and insists that, while the latter referred to a high degree of care, the former refers only to reasonable care. One of the rules of the defendant of which the decedent had knowledge is as follows: "79. When trains are running in heavy rainstorms, or immediately after such storms, engineers will run very cautiously." It is evident that the rule is designed to govern the running of trains, during or immediately after heavy rainstorms, over portions of the track liable to be affected by such storms. The interrogatory in question necessarily assumes that the train reached the place of the accident during or immediately after a heavy storm, which increased the hazard of running the train at that place. But the evidence does not show that the heavy rainstorm which was raging when the decedent left McGregor with his train extended west of Postville or Ossian, some forty miles east of Wapsie, and it had ceased several hours before the Wapsie was reached. If there had been a heavy storm on that stream, it does not appear that the decedent knew of it. The jury found that the decedent knew that he was running his engine immediately after a heavy rainstorm, but it did not find that the storm referred to affected the crossing of the Wapsie. Therefore, the interrogatory related to an immaterial fact, as the degree of care which the jury found that the decedent observed was all the defendant

had a right to require. But if it be assumed that the case was one to which rule 79 was applicable, and that the jury found that the decedent, at the time of his death, was using only reasonable or ordinary care, was that the degree of care required by the rule? What is reasonable care in any given case depends upon all the circumstances of the case. Acts which would amount to reasonable care in one case might constitute gross negligence in another. Under circumstances of great peril, reasonable care may require unusual precautions. Hence the ordinary rule, in cases of this kind, has been stated as follows: The employe should exercise such care as a prudent person might reasonably be expected to exercise in view of all the circumstances of the particular case, so far as they are known to him, or are discoverable in the exercise of proper diligence. *Baird v. Chicago, R. I. & P. Ry. Co.*, 61 Iowa, 361. We think the rule of the defendant under consideration was only designed to require that high degree of care which would be reasonable under the unusual circumstances which the rule specified. That construction is necessary to sustain the rule, for the reason that a railway corporation cannot avoid liability for the negligence of its employes by requiring of an employe injured by reason of such negligence more than reasonable care in the discharge of his duties. Code, sec. 1307; *Rose v. Des Moines V. Ry. Co.*, 39 Iowa, 247; *Little Rock Ry. Co. v. Eubanks*, 48 Ark. 460; 3 S. W. Rep. 808.

VIII. Rulings of the court in giving and refusing certain instructions, and in giving portions of its charge, are criticised. What we have already said disposes of most of the questions thus presented. It is only necessary to say that the charge to the jury was full and fair to the defendant.

s. ——: ——: ——: verdict: evidence.

The evidence tended to show a faulty construction of its roadway at the place of the accident; that insuf-

ficient provision had been made for the passage of water; and that many of the ties were in bad condition, and not suitable for the use which had been made of them. The decedent seems to have managed his engine with reasonable care. He was warned to guard against danger at two places, but it does not appear that he was ever informed of anything that required unusual care at the Wapsie. On the contrary, the employes of an east-bound train which crossed that stream about two hours before the accident, and which met the train of decedent at Jackson's Junction, an hour later, reported that the road was all right. Before the Dry bridge was reached, the decedent applied the airbrakes, and slackened the speed of the train, releasing the brakes when the level track a short distance east of Dry bridge was reached. He was in his proper place, looking ahead, but there was a fog above the water, and the ice could not be seen until too late to check the train and avoid the collision. We are of the opinion that the evidence justified a verdict against the defendant, and that the amount of the verdict is not excessive.

The judgment of the district court is, therefore, AFFIRMED.

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# J. V. BENJAMIN, Appellant, v. J. J. SHEA, Clerk, etc., Appellee.

1. **Evidence**: COURT FILES. An execution found with the papers in a cause, and purporting to have been issued therein, but not bearing the clerk's seal nor filing mark, is not admissible in evidence in another action in proof of its having been issued in such cause.

2. ———: ATTACHMENT: OFFICER'S RETURN. The words, "duly served," contained in an entry upon the appearance docket of the district

court indicating the return of a writ of attachment, issued in the cause, are not admissible in evidence in proof of the service of such writ.

3. ———: TITLE TO LAND. The testimony of an alleged owner of real estate is not competent in proof of his title.

4. ———: ———: BURDEN OF PROOF: APPEAL. Where the title to real estate was in issue, and the plaintiff in his pleadings and upon the trial assumed the burden of proof thereon, *held*, that upon appeal the plaintiff would not be heard to claim that the burden of proof as to such issue was upon the defendant.

*Appeal from Pottawattamie District Court.*—HON. H. E. DEEMER, Judge.

MONDAY, OCTOBER 12, 1891.

THE plaintiff commenced an action in the district court at Avoca against Anderson Davis on two unmatured promissory notes, executed by Davis to W. H. Longanecker, in which action an attachment was issued and levied upon certain land as the property of Davis. Entry of the levy was made in the incumbrance book kept at the clerk's office at Avoca, but, through neglect of the clerk, was not certified to nor entered in the incumbrance book kept in the clerk's office at the county seat. William Miller, having purchased the land after the levy, intervened in that action, and judgment was entered discharging the land from the attachment. See *Benjamin v. Davis*, 73 Iowa, 715. Judgment was afterwards rendered against Davis on the notes. The appellant alleges that Davis was the owner of the land levied upon; that he has no other property; and that, by the neglect of the clerk, the plaintiff is damaged to the amount of his judgment. Among other defenses set up in the answer is a denial that Davis owned the land attached, and that, at the time the land was discharged from the attachment, the notes were not due; that the indorser was solvent; and that the appellant failed to make demand of payment, and give notice of non-payment to the indorser, thereby

releasing the indorser, whereby he is estopped from maintaining his claim against the defendant. The case was tried to the court, and judgment entered for the defendant upon a finding that "there is no proof that Anderson Davis was the owner of the land at the time of the levy of the attachment, and that the plaintiff, after discovery of the neglect of the defendant, failed to protect the defendant from injury by protesting the notes." The plaintiff appeals.—*Affirmed.*

*Harl & McCabe*, for appellant.

*Walter I. Smith* and *Sapp & Pusey*, for appellee.

GIVEN, J.—I. The appellant assigns as errors a number of rulings admitting and excluding testimony, all of which we have examined, and fail to find any prejudicial error in the rulings. A paper purporting to be an execution in the case of *Benjamin v. Davis* was properly excluded, as it did not bear the clerk's seal or filing mark, and was not otherwise identified than by being found with the papers in that case.

1. EVIDENCE: court files.

II. The appearance docket showed in the same case, "Writ of attachment returned, and duly served." The words, "duly served," were properly excluded, as section 3010 of the Code requires that the fact constituting the service shall be stated in the return. *Aultman v. McGrady*, 58 Iowa, 118.

2. ——: attachment: officer's return.

III. Davis' ownership of the land attached was in issue, and called for the best evidence; hence, there was no error in excluding Davis' testimony as to his ownership. It is said that other land than that under notice was attached, and that this testimony was to show that he did not own the other land. As neither party was claiming anything in respect to the other land, the inquiry was imma-

3. ——: title to land.

terial. Other errors assigned upon the admission and exclusion of testimony do not require special mention.

IV. Question is made as to which party had the burden of proving that Davis had an attachable interest in the land at the time of the levy. The appellant contends that when he showed the indebtedness of Davis, the issuing, levy and return of the attachment, and neglect of the appellee by which the lien was lost, he was *prima facie* entitled to recover the full amount of Davis' indebtedness, unless the appellee showed that the land, or Davis' interest therein, was less valuable, or that he had no interest in the land. There is some conflict in the authorities upon this subject, yet the weight of authorities in this country seems to sustain the rule contended for. 2 Sedgwick on Damages, 449; *Sloan v. Case*, 25 Am. Dec. 569, and notes; *Ledyard v. Jones*, 7 N. Y. 550; *Harris v. Kirkpatrick*, 35 N. J. Law, 392. The appellee, without questioning the rule claimed by the appellant, maintains that, as the appellant alleged, and throughout the trial assumed the burden of proving, that Davis owned the land at the time of the levy, he must continue to carry that burden. The appellant did allege that Davis owned the land, and, this being denied, offered testimony for the purpose of showing that fact, which, as we have seen, was properly excluded. Some twenty days after the case was fully submitted and taken under advisement the appellant moved to set aside the submission, and for leave to introduce further testimony as to Davis' title, on the ground that it had been omitted through mistake and oversight, which motion, being overruled, the appellant excepted. It is manifest that, throughout the entire trial, the appellant assumed the burden of proving that Davis had an attachable interest in the land, and it was at no time claimed that the burden of so proving was not on the appellant. Whether the rule be as contended by the

4. —: —: burden of proof: appeal.

appellant we do not determine. It would be unjust to permit the appellant to now, for the first time, assert the rule. It would not only be a surprise to which the appellee should not be subjected, but would deprive him of the benefit of testimony which he might have otherwise introduced. The appellant, having thus assumed the burden of proving Davis' ownership, must be held to carry it on this appeal. *Musser v. Maynard*, 55 Iowa, 197; *Denton v. Chicago, R. I. & P. Ry. Co.*, 52 Iowa, 161. The testimony offered being excluded, there was no evidence whatever that Davis had any interest in the land. True, the deed from Davis to Miller is in evidence, but, without showing title in Davis, it proves no ownership in him. *Wearin v. Munson*, 62 Iowa, 466; *Heinrichs v. Terrell*, 65 Iowa, 25. Having assumed, as he did, the burden, it was upon the appellant to show that Davis had an attachable interest in the land at the time the levy was made, which he has entirely failed to do. As for this reason the judgment of the district court must be affirmed, we do not consider the question whether the appellant's failure to protest the notes defeats his right to recover. AFFIRMED.

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# SHICKLE, HARRISON & HOWARD IRON COMPANY, Appellee, v. COUNCIL BLUFFS CITY WATER-WORKS COMPANY, Appellant.

**Sale**: GUARANTY AS TO PAYMENT OF PURCHASE PRICE: CONSTRUCTION. By a contract between the plaintiff and defendant and a certain construction company, the plaintiff undertook to furnish the construction company with certain materials in installments, and at prices named, which the construction company agreed to pay for weekly to the extent of ninety per cent. of the value of the materials received, and to make monthly payments in full for all materials received in the month preceding; such payments to be made upon drafts drawn at

three days' sight by the plaintiff. The faithful performance of all the obligations of this contract by the construction company was guaranteed by the defendant, and to such end agreed to deposit as security for the full performance of said obligations the sum of ten thousand dollars with a bank named, the same to be applied to the payment of any sum which the said construction company might fail to pay in the manner set forth in said contract. *Held*, that the guaranty of the defendant was not special, as applying only to dishonored or repudiated drafts drawn upon the construction company, but was general, and that the defendant was liable to the plaintiff thereon for the amount of the unpaid balance due from the construction company for materials furnished under said contract, whether drafts had been drawn therefor upon the construction company or not.

*Appeal from Pottawattamie District Court.*—HON. N. W. MACY, Judge.

MONDAY, OCTOBER 12, 1891.

ACTION to recover on a contract of guaranty. There was a judgment for the plaintiff from which the defendant company appeals.—*Affirmed.*

*Wright, Baldwin & Haldane*, for appellant.

*John L. Webster* and *J. Lyman*, for appellee.

GRANGER, J.—The plaintiff company is a corporation organized under the laws of the state of Missouri, the defendant company is a corporation organized under the laws of this state, and the American Construction Company is a corporation organized under the laws of the state of New York. These corporations are, for the sake of brevity, designated in the record as the "iron company," the "water-works company" and the "construction company," and these designations will, for the same reason, be followed in the opinion. The business of the iron company is the manufacture and sale of iron pipes, castings, etc.; of the construction company, that of constructing systems of water works; and that of the water-works company the operation of

a system of water works at Council Bluffs, Iowa. On the twelfth day of April, 1882, the three companies entered into a written agreement, in which it was recited:

"That whereas the said construction company is now engaged in constructing a system of water works for the said water company at the city of Council Bluffs, and will require in the construction thereof a certain quantity of cast-iron pipe, and the special castings properly belonging thereto, all of which is set forth in a specification annexed hereto; and whereas the said iron company is prepared to furnish all of said pipe and special castings, and is willing to deliver the same at the city of Council Bluffs at the period, and for the prices, and on the terms hereinafter named: Now, therefore, this agreement witnesseth, that for and in consideration of the premises, and of the sum of one dollar, lawful money of the United States of America, this day in hand paid by each of the parties hereto to each of the other parties hereto, the receipt whereof is hereby acknowledged, and, in consideration of the covenants and agreements to be hereinafter kept by each of the parties hereto, the said parties of the first, second and third parts hereto have agreed, and do hereby agree, each with the other, as follows, that is to say: *First*, that the said iron company shall and will furnish all pipes and special castings named in the specifications annexed hereto, and strictly in accordance with the provisions therein named, or the modifications therein made, and shall and will deliver all of the same on cars at the city of Council Bluffs, Iowa, within five months from the date hereof; shipments to commence immediately, and to proceed in the following order, namely: The four, six and eight-inch pipe, and the special castings properly belonging thereto, shall be delivered within sixty days from the date hereof; and the ten, twelve, sixteen, twenty and

twenty-four inch pipe, and the special castings belonging thereto, shall be delivered within three months thereafter." The second and third paragraphs are unimportant in this connection, being specifications as to quantity and price of the pipe and castings. Then follows: "*Fourth.* That payment for said pipe and special castings shall be made weekly by the said construction company to the said iron company of ninety (90) per cent. of the value of all pipe and special castings shipped, and monthly payments in full shall be made on or before the fifteenth (15) day of each month for all the said pipe and special castings delivered on cars at Council Bluffs in the month preceding; all payments to be made upon drafts drawn at three days' sight by the said iron company upon the said construction company. *Fifth.* That the said water-works company shall, and it does hereby, guaranty the faithful performance by the said construction company of all the obligations herein set forth, and all of the provisions of this agreement, and to this end will and hereby agrees to deposit, as security for the full performance of said obligations, the sum of ten thousand dollars in the hands of the Commercial Bank of St. Louis, the same to be applied to payment to the said iron company of any such sum as the said construction company may fail to pay in the manner herein set forth, and the said iron company agrees to allow the said construction company interest at the rate of six per cent. per annum on the above ten thousand dollars, or any part thereof not used for the purpose of payment as above set forth, and the total amount, with accrued interest, to be applied upon final payment under this contract."

Pursuant to the contract, the plaintiff company furnished pipe and castings for the construction of the water works at Council Bluffs, on which it claims an unpaid balance of fifty-two hundred and twenty-nine

dollars and two cents, with accrued interest, and this action is brought to recover from the defendant company on its contract of guaranty. The contention in the case arises on a construction of the contract of guaranty; it being that of the defendant company that its obligation was only "to make good dishonored or repudiated drafts drawn by the iron company or the construction company;" that it only guaranteed that the construction company would meet these drafts." The appellee's contention is that the undertaking of guaranty is broader, and of a general, rather than of a technical or special, character. We think, when the contract is considered in all its parts, the position of the appellee must be sustained. There is at first view a seeming force to the idea that, because of the words in the contract, "all payments to be made upon drafts drawn at three days' sight by the iron company upon the said construction company," the obligation of guaranty arises only when the facts show a failure of the construction company to pay upon drafts so drawn and presented. But a closer scrutiny of the language of the contract and the purpose of the parties, as indicated by its use, leads to a different and far more satisfactory conclusion. We think it unmistakable from the record that at the commencement of this suit the construction company was indebted to the plaintiff company to the amount specified in the judgment rendered by the district court, and that the failure of payment of the construction company in no manner depended upon a neglect or failure to present drafts therefor. We are then to consider the point of defendant's liability, with the fact in view that the construction company has not met its obligations, unless we hold that no obligation arises because of a failure to observe a useless formality in presenting the drafts when payment would be refused or neglected, which we are neither asked nor disposed to do.

With the obligation of the construction company thus fixed for the purposes of the case, we properly come to the question of the defendant company's obligation under the contract of guaranty, and must look to the language giving rise to it. The fifth paragraph of the contract is the only one specifying its obligation, and it provides "that the said water-works company shall, and it does hereby, guaranty the faithful performance by the said construction company of all the obligations herein set forth, and all of the provisions of this agreement, and to this end will and hereby agree to deposit as security," etc. It contains no words limiting the obligations of guaranty to the payment of dishonored drafts, but, on the contrary, it expressly guarantees the performance by the construction company "of all the obligations" set forth in the contract. The obligations of the construction company for payment are those arising under the contract, and we see no escape from the conclusion that the defendant company is liable. This holding effectuates justice, and is in harmony with the rule that in construing contracts of guaranty technicalities should be avoided, and the reasonable intent of the parties, as it may be gathered from all parts of the contract, should prevail. See, as more or less supporting the rule; *Wadsworth v. Smith*, 43 Iowa, 439; *Tootle v. Elgutter*, 14 Neb. 158; 15 N. W. Rep. 228; *Weiler v. Henarie*, 15 Or. 28; 13 Pac. Rep. 614; *Union Bank v. Coster*, 3 N. Y. 203; *Dobbin v. Bradley*, 17 Wend. 422.

With these views, the judgment of the district court must be and is AFFIRMED.

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# D. S. TAYLOR, Appellee, v. MERCHANTS & BANKERS' INSURANCE COMPANY, Appellant.

1. **Fire Insurance Policy: CONDITIONS: CHANGE OF OWNERSHIP: CHATTEL MORTGAGE.** A stipulation in a fire insurance policy upon personal property, that the policy should become void in the event of any change in the title, ownership or possession of the property insured, is not violated by the execution of a mortgage upon such property to one who had an insurable interest in the property at the time the policy was issued.

2. ———: ———: ———: **ACTION PREMATURELY BROUGHT: ABATEMENT.** A provision in an insurance policy against fire, that in case of loss the amount thereof shall be payable within sixty days after notice and proofs of loss have been received at the office of the company, will not entitle the insured to commence an action on such policy before the expiration of ninety days after giving notice of the loss, as provided by section 3, of chapter 211, of the acts of the Eighteenth General Assembly, and an action brought upon a policy before the expiration of such time may be abated by a motion in arrest of judgment.

*Appeal from Fremont District Court.*—HON. GEORGE CARSON, Judge.

TUESDAY, OCTOBER 13, 1891.

ACTION upon a policy of insurance. There was a judgment upon a verdict for plaintiff. The defendant appeals.—*Reversed.*

*A. A. Haskins*, for appellant.

*A. R. Anderson*, for appellee.

BECK, C. J.—I. The policy is issued to the plaintiff against loss by fire upon a building used as a mill, and the machinery therein. It is stipulated in the policy that "loss, if any, [shall be] payable to Johnson & Rhode, as their interest may appear, for material." The application shows that the plaintiff is the owner

1. FIRE insurance policy: conditions: change of ownership: chattel mortgage.

of the property insured, and the stipulation in the policy just quoted is repeated in the application, in the very words found in the policy. It is declared in the application that the plaintiff is the owner of the property insured, and that the personal property covered by the policy is not incumbered, but nothing is said as to incumbrances on the real estate. The policy contains a stipulation to the effect that it shall be void if any change takes place in the title, ownership or possession of the property insured. It is insisted that a chattel mortgage executed to Johnson & Rhode so changed the title of the property as to avoid the policy under the stipulation.

II. The insurance upon the building cannot be affected by the stipulation, for the reason that the chattel mortgage does not cover the house. In our opinion, the chattel mortgage did not effect such a change of the ownership or possession of the personal property covered by it as to defeat the policy. The policy and application show that Johnson & Rhode had an interest in the insured property for material furnished. This fact is also shown by the evidence. What that interest was is not shown, further than that it arose upon an indebtedness for material furnished. It is to be regarded as an insurable interest, for the parties so treat it in the policy, which covered that interest when it was originally issued. Now, the chattel mortgage would not have the effect of changing or destroying that insurable interest; nor did it affect or change the plaintiff's interest in the property. He had the same interest after the mortgage as before, namely, the title subject to the claim, lien or interest held by Johnson & Rhode, whatever that may be. Assuming that the plaintiff owned the title to the property, Johnson and Rhode had an insurable interest when the policy was issued, and that interest continued after the chattel mortgage was executed. The chattel mort-

gage is but a security for a debt, the ownership remaining in the mortgagor. *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325. The plaintiff, both before and after the mortgage, held the ownership of the property subject to the interest of Johnson & Rhode. There was, therefore, no change in the title, ownership or possession of the property wrought by the chattel mortgage, which, therefore, did not avoid the policy. The district court in instructions to the jury held to this effect.

III. The policy contains a condition that, in case of loss, the amount shall be paid within sixty days after notice and proof thereof are received at the office of the company. The action was commenced after the loss became payable under the provisions of the policy. Section 3, chapter 211, Acts of the Eighteenth General Assembly, provides that no action upon a policy of insurance "shall be begun within ninety days after notice of loss has been given." The effect of this statute, it has been held, is to fix the time when the loss becomes due and payable, so that an action may be brought to recover on the policy. *Quinn v. Capital Ins. Co.*, 71 Iowa, 615. It would rather appear that the statute does not affect the maturity of the contract, but, rather, is a legislative prohibition of the action before the time specified. Certain it is the statute declares that a suit shall not be brought until after ninety days. This statute was enacted before the policy in suit was issued, and, therefore, became a part of the contract of the parties. The action, being commenced before the expiration of ninety days after the notice of loss was given, was prematurely brought, and must, therefore, fail. This objection was rightly raised by motion in arrest of judgment, which was erroneously overruled. Counsel for the plaintiff insist that the statute in question is a statute of limitations, and

2. —: —: —: action prematurely brought: abatement.

therefore the objection should have been raised by the answer pleading the statute as a defense. It will be readily seen that the statute does not limit the time in which actions may be brought, but forbids an action to be brought before a prescribed event. It is in fact a statute prescribing a time before which an action cannot be brought. This the statute of limitations does not do. It prescribes that an action cannot be brought after a fixed time.

IV. Objection is made to an instruction as to waiver by the agent of the defendant of objection on the ground of the change of the ownership by the policy. We do not consider the instruction, for we may not be agreed thereon. If it be assumed that it is erroneous, it is without prejudice, for the reason the verdict, without the instruction, could not have been different, for the reason that, as we have shown, there was no change of title, ownership or possession of the property, which avoids the policy.

Other questions argued by counsel need not be considered. For the error pointed out the judgment of the district court is REVERSED.

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# MARY R. SORENSON *et al.*, Appellees, v. F. R. DAVIS *et al.*, Appellants.

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1. **Title to Real Estate**: DEED: RECORD: NOTICE. The defendants, in proof of their title to the real estate in controversy, introduced the record of a deed from one Teufel, which name, in copying the deed upon the record, the recorder had written "Temple," or had written "Teufel" so indistinctly that it might be read "Temple." The original deed was not introduced in evidence. *Held*, that in the absence of any showing of prejudice from the condition of the record, the defendants' title, through Teufel, would be considered established.

2. **Tax Titles**: TENANTS IN COMMON: PURCHASE BY TRUSTEE. One who holds the legal title to real estate, as trustee for one of several tenants in common, cannot either by himself, nor in conjunction with a stranger to the title, acquire a tax title thereto adverse to the co-tenants of his *cestui que trust*; neither can such persons acquire title to such real estate as against such co-tenants by purchase from one to whom a tax deed has issued.

3. ———: ———: ———: NOTICE: BONA FIDE PURCHASER. A purchaser of real estate, with constructive notice that the title thereto is based upon a tax title acquired by a trustee for one of several tenants in common, is not entitled to have his title protected against the right of the co-tenants to redeem, by reason of his being a remote *bona fide* purchaser for value.

*Appeal from Pottawattamie District Court.*—HON. H. E. DEEMER, Judge.

TUESDAY, OCTOBER 13, 1891.

ACTION in equity to establish and confirm in the plaintiffs the title to one moiety in lots 1–3, block 28, and lots 1–10 and 21–30, block 49, in Brown's subdivision in the city of Council Bluffs. The plaintiffs claim such title as the heirs-at-law of W. D. Brown, deceased, and allege that the appellant Davis claims to be the absolute owner of the whole title, under certain pretended tax deeds to the defendants, John T. Baldwin and G. M. Dodge, and to the firm of Baldwin & Dodge; that, ever since 1857, the plaintiffs and their ancestors, under whom they hold title, have owned said lots in common with John T. Baldwin and G. M. Dodge, and their grantees, including the defendant Davis, and were tenants in common with John T. Baldwin and G. M. Dodge at the time of the tax sales and deeds to them, and to their firm of Baldwin & Dodge, by reason of which tenancy said deeds convey no title adverse to the plaintiffs; that John T. Baldwin and G. M. Dodge, and the firm of Baldwin & Dodge, were the agents of the ancestors of the plaintiffs for the payment of the taxes at the time of the tax sales and deeds, by reason of which, said sales and deeds conveyed

no title adverse to the plaintiffs. The plaintiffs proffer payment of all amounts paid as taxes or redemption, and ask that title be confirmed to them in the undivided one-half of said lots. The defendant, F. R. Davis, alone appears. He answers, denying the alleged tenancy in common and the alleged agency. He sets out a chain of title to himself under certain tax deeds and subsequent conveyances, alleges adverse possession since 1873, and that the plaintiffs' action is barred, and asks to be quieted in his title to the entire property. A decree was entered in favor of the plaintiffs, from which the defendant Davis appeals.—*Affirmed.*

*L. W. Ross*, for appellants.

*W. I. Smith*, *Finley Burke* and *J. E. F. McGee*, for appellees.

GIVEN, J.—I. There is no question but that W. D. Brown, the ancestor of plaintiffs, died seized of the undivided one-half of the lots in controversy; neither is there any question as to the defendants' chain of title under the tax deeds, except as to a single link. Frank J. Magin and wife, having title under the tax deeds, conveyed to "Christian Temple," as it is claimed to appear in the record of the deed, which alone is in evidence, while it was "Christian Teufel" who made the conveyance under which the defendants claim. We have neither the deed nor the record of it before us, but the transcript of the record might be read as either "Temple" or "Teufel." There is no evidence that there were different persons known by these names. The whole contention arises out of the recorder having written the name "Temple" instead of "Teufel," or in writing "Teufel" so indistinctly that it might be read "Temple." If the plaintiffs, as innocent purchasers, had been misled by the condition of the record, the subject would

1. TITLE to real estate: deed: record: notice.

be entitled to closer consideration. We are in no doubt but that the conveyance was to "Christian Teufel," under whom the defendants claim, and that the defendants have shown a complete chain of title under the tax deeds.

Upon the trial the appellant Davis offered the record of several of the deeds and other documents in evidence, to which the plaintiffs objected as secondary. We think the foundation was sufficiently laid for admitting the record of these instruments in evidence.

II. The only grounds upon which the tax titles, under which the defendants claim, are questioned are the alleged tenancy in common, and the alleged agency for the payment of taxes. The facts upon which such tenancy and agency are claimed are these: W. D. Brown, being the sole owner of the land, executed a bond for a deed "of an undivided half to Baldwin, Dodge & Co.," a firm composed of John T. Baldwin, G. M. Dodge and Leroy Tuttle, November 1, 1856. On January 24, 1857, in pursuance of said bond, Brown executed a deed to John T. Baldwin, which, though to him alone, upon its face was, in fact, in trust for Peter R. Reed and others; Baldwin having no interest therein other than as trustee, and Dodge having no interest whatever. In August, 1857, Brown and Baldwin platted part of the land into an addition known as "Brown's Subdivision," and Baldwin executed conveyances from time to time, as directed by Reed. The defendant Davis' title is based upon numerous tax deeds executed to different persons, who afterwards conveyed to John T. Baldwin and G. M. Dodge and tax deeds executed directly to them. The taxes for which these sales were made accrued while Baldwin and Brown held the legal title. Baldwin testifies, without contradiction, that neither he nor Baldwin, Dodge & Co. had any interest in the lands; that the deed was to him, in

2. TAX titles: tenants in common: purchase by trustee.

trust for Reed and other parties residing in the east, for convenience. Dodge testifies that he had no interest in the land prior to acquiring it by tax title. The allegation of agency being denied, the burden of proving it is upon the plaintiffs. There is no evidence whatever that either Baldwin or Dodge, or the firms of which they were members, were agents of Brown for the payment of taxes; but, upon the contrary, Baldwin testifies that Brown was a resident of Omaha, and that he does not think they paid taxes for him. Mr. Brown died in February, 1868, and the firm of Baldwin, Dodge & Co. was dissolved in 1856, and the firm of Baldwin & Dodge in 1860. We think the plaintiffs have failed to establish the charge of agency.

III. It is a well-established principle that a tenant in common cannot acquire title adverse to his co-tenants by purchase at tax sale; "he will be regarded as holding the title he thus acquires in trust for his co-tenants, until the presumption is repelled by their refusal to contribute in payment of his outlays." *Weare v. Van Meter*, 42 Iowa, 128; *Fallon v. Chidester*, 46 Iowa, 593; *Austin v. Barrett*, 44 Iowa, 488. As trustee, Baldwin stood for, and in the place of, Reed and the others for whom he held the legal title, and could not acquire any interest in the land adverse to them. Had Reed and the others acquired these tax titles, they would be regarded as holding them in trust for their co-tenants. We think the reason for the rule applies with equal force to their trustee.

We have seen that Dodge did not have any interest in the property that would prevent him from having alone acquired a valid tax title to it. His title, however, is jointly with one who could not acquire such a title. If the trustee may not acquire a tax title to himself as against the co-tenants of his *cestui que trust*, surely he should not be allowed to do so by joining

with one who might have alone acquired such a title. Baldwin should not be permitted to do indirectly what he could not do directly. Dodge having taken title jointly with Baldwin, who was incapacitated from doing so, the whole title must fail. *Spicer v. Rowland*, 18 Pac. Rep. (Kan.) 908.

One J. M. Phillips purchased certain lots at tax sales, and received deeds therefor, and afterwards, on December 5, 1873, conveyed to John T. Baldwin and G. M. Dodge. It is contended that this purchase by Phillips extinguished the patent title, and, therefore, dissolved the co-tenancy, and that either co-tenant might acquire this new title. The reason that would not allow the co-tenant to purchase this new title originally certainly should incapacitate him from afterwards purchasing it to the prejudice of his co-tenants. The purchase by Phillips did not extinguish the obligations of these co-tenants to the property and to each other.

IV. It is contended that the appellant is entitled to protection as a remote purchaser in good faith for value. While it is true the chain of deeds from Baldwin & Dodge to the appellant Davis is connected and complete, and vests in him the moiety that Baldwin held in trust, it is equally true that the appellant Davis was notified by the records that Baldwin only held an undivided half; that he was tenant in common with Brown, and with the plaintiffs after Brown's death. He must be taken to have known that, as such tenant in common, Baldwin could not alone, or jointly with Dodge, acquire title under the tax deeds adverse to his co-tenants. The deed from Baldwin & Dodge was not an ouster of the co-tenants of Baldwin, but simply transferred the co-tenancy from Baldwin to his grantees. The limitation did not commence to run from the time of obtaining an adverse title, but from the time of ouster. *Robinson v.*

2. ——: ——: ——: notice: bona fide purchaser.

*Lake*, 14 Iowa, 421. The appellants having purchased with constructive notice of Baldwin's incapacity to acquire title as against his co-tenants under the tax sales, they are not entitled to protection by reason of being remote purchasers for value; and, there being no ouster the plaintiff's action is not barred by the provisions of section 2529 of the Code. Neither is it barred by section 902, because it is not an attack upon the validity of the tax sales and deeds, but upon the capacity of Baldwin to acquire title thereby. *Austin v. Barrett*, 44 Iowa, 488.

We reach the conclusion that the decree of the district court should be AFFIRMED.

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## W. R. EMERICK, Appellee, v. DAVID EMERICK, Appellant.

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**Guardians**: APPOINTMENT OF FOR FEEBLE-MINDED PERSONS. A person of the age of seventy-nine years, and possessing an estate of over five hundred acres of land, yet who appears to be capable of transacting the ordinary business involved in taking care of his property, and to understand the nature of the business, and the effect of what he does, and to be able to exercise his will with reference to such business with discretion, notwithstanding the influence of others, is not a person of such unsoundness of mind as to warrant the appointment of a guardian of his property under section 2272 of the Code.

*Appeal from Mills District Court.*—HON. GEORGE CARSON, Judge.

TUESDAY, OCTOBER 13, 1891.

THE plaintiff seeks to have appointed a guardian of the estate of the defendant on the alleged ground that he is of unsound mind, and is not possessed of the judgment necessary for the management of his estate.

The cause was tried to a jury, which found that the defendant was of unsound mind. A judgment was rendered on the verdict, and the defendant appeals. *Reversed.*

*Scott Lewis* and *H. C. Watkins*, for appellant.

*T. L. Genung* and *Shirley Gilliland*, for appellee.

ROBINSON, J.—This proceeding was instituted under section 2272 of the Code. The petition alleges that the defendant owns and has the management of an estate of five hundred and fifty-seven acres of land, situated in Mills county, of the value of about twenty thousand dollars; that he is old and infirm, and of unsound mind, and is not possessed of the judgment necessarily required for the management of his estate; that he has become possessed of the delusion that he can make large sums of money in the real-estate business in Nebraska, and for the purpose of engaging in such business he has contracted to sell his real estate for four or five thousand dollars less than it is worth; that his wife exerts an undue influence over him, to the detriment of himself and of his property; that by reason of his infirmities of mind and body, and the undue influence of his wife, he has been attempting to dispose of his property in various ways, and place it under the control of his wife or her friends; and that he has not sufficient mind to resist her undue influence. The defendant admits the ownership of the land as claimed by the plaintiff, but denies that he is of unsound mind, and that he is subject to undue influence. The defendant was seventy-nine years old at the time of the trial in the district court. Two years before that time his wife died, and a year and a half after her death he married his present wife. She was active in bringing about the marriage, and some of the evidence tends to show that she became a party to it

for mercenary reasons, and that she attempts to influence improperly her husband against his children, of whom the plaintiff is one. There is evidence to show that the defendant is easily influenced to become surety for irresponsible persons, and that he has incurred losses by so doing. He admits having contracted to sell his land for twenty-five dollars per acre, but it is not certain that it is worth much, if any, more than that amount. The evidence as to his mental capacity was conflicting, and, had the jury found that he was of sound mind, the verdict would not have been without support in the evidence.

That being the condition of the case, the court charged the jury, in substance and effect, that a person of sound mind is one who exercises ordinary understanding and ability in the transaction of business, and that, if the defendant was not possessed of "sufficient strength of mind and ability to transact his business affairs with ordinary care and prudence, then, in law, he will be deemed of unsound mind." The question presented for our determination is whether the test of mental unsoundness given by the court is correct. Section 2272 of the Code provides for the appointment of a guardian of the property and minor children of a "person of unsound mind." The statute is silent as to what shall constitute the unsoundness which it contemplates, but it is clear that it relates to the capacity of the person affected to transact business. The protection of property is one of the main objects of such statutes as that under consideration, and the test of the unsoundness in question is largely the incompetency of the person to manage property in a rational manner. 1 Wharton & Stille on Medical Jurisprudence, sec. 103. A person may be so weak and infirm as to be easily influenced in such manner that the transactions had under the effect of such influence will be set aside, and yet not be so unsound of

mind as to warrant the appointment of a guardian of his property. Sec. 104. The unsoundess of mind which will justify such an appointment must be more than mere debility or impairment of memory. It must be such as to deprive the person affected of ability to manage his estate. *In re Lindsley*, 10 Atl. Rep. (N. J. Ch.) 549.

The fact, that a person by reason of age, ignorance and feeble condition of mind and body is unfit to manage his estate judiciously, will not authorize the appointment of a guardian of his property. *Commonwealth v. Reeves*, 21 Atl. Rep. (Pa. Sup.) 315. "Imbecility of mind is not sufficient to set aside a contract when there is not an essential privation of the reasoning faculties or an incapacity of understanding and acting with discretion in the ordinary affairs of life." 2 Kent's Commentaries, 609. "Courts of law, as well as equity, afford protection to those who are of unsound mind. They endeavor to draw a line between sanity and insanity, but cannot so well distinguish between degrees of intelligence." 1 Parsons on Contracts, 387. "The law does not assume to measure the different degrees of power of the human intellect, or to distinguish between them where the power of thought and reason exists." *Somers v. Pumphrey*, 24 Ind. 245. In *Davren v. White*, 42 N. J. Eq. 569; 7 Atl. Rep. 682, there was evidence to show that the person whose act was in question lacked mental capacity. But the court held that the test in such cases is, "Did the person whose act is brought in judgment possess sufficient ability at the time he did the act to understand in a reasonable manner the nature and effect of his act or the business he was transacting?" "Although the mind of an individual may be to some extent impaired by age or disease, still, if he be capable of transacting his ordinary business, if he understand the nature of the business in which he is engaged

and the effect of what he is doing, and can exercise his will with reference thereto, his acts will be valid." *English v. Porter*, 109 Ill. 291. In *Fiscus v. Turner*, 24 N. E. Rep. (Ind. Sup.) 662, a rule was approved as follows: "Unsoundness of mind is where there is an essential privation of the reasoning faculties, or where a person is incapable of understanding and acting with discretion in the ordinary affairs of life." A court of equity will not ordinarily set aside a transaction on the ground of mere weakness of understanding, or liability to be sometimes deceived and duped, on the part of one of the parties to it. Such party must be, in a legal sense, of unsound mind. *Henderson v. McGregor*, 30 Wis. 80.

Some of the authorities cited refer to the mental capacity which is sufficient to enable a person to enter into a valid contract. Cases may arise where a person competent to make such a contract is so subject to an improper influence, or is so affected by some delusion, or is so liable to be controlled to his prejudice by some other cause, that he should be deprived of the right to manage his property; but ordinarily a person who has sufficient mental capacity to make a valid agreement in regard to his property, and to manage it with reasonable care, unaffected by another's will, should be permitted to retain it. It is manifest that there may be such a degree of mental capacity less than that possessed by persons of ordinary understanding and ability. The deficiency may be due to ignorance, or a want of shrewdness, or to other causes which do not denote unsoundness of mind. If a person may be deprived of the control of his property, because he does not exercise ordinary understanding, ability and prudence in managing it, large numbers of people who now display a reasonable degree of care and judgment in accumulating, keeping and disposing of property may be deprived of the right to do so, because the

business skill and ability they manifest is not quite equal to that commonly exercised. We do not think such a rule as that should prevail. In *Seerley v. Sater*, 68 Iowa, 375, it was said that, "A person of unsound mind is one incapable of transacting the particular business in hand." The question to be determined in this case was whether the defendant was capable of managing his estate, not whether he was capable of managing it as well as such estates are commonly managed. No general rule can be given which will be alike applicable to all cases, but each must be determined largely by its own facts and the conditions which control it. In this case if the defendant is capable of transacting the ordinary business involved in taking care of his property, and if he understands the nature of the business, and the effect of what he does, and can exercise his will with reference to such business with discretion, notwithstanding the influence of others, he is not of unsound mind, within the meaning of the statute, and should not be deprived of the control of his property. The charge of the district court required a higher degree of mental capacity than that, and is to that extent erroneous. Other questions are discussed by counsel, but, as they are not likely to arise on another trial, need not be determined.

For the reasons indicated the judgment of the district court is REVERSED.

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# FRANCISKA LEHNER, Appellee, v. C. C. LOOMIS *et al.*, Appellants.

**Judicial Sale**: INADEQUACY OF CONSIDERATION: FRAUD: REDEMPTION. Where in an action against the occupants of a building, and one holding a legal title to the real estate, to abate the keeping of a saloon

nuisance, judgment was rendered against the defendants for costs, including an attorney's fee, to the amount of thirty-one and fifty-hundredths dollars, and under a general execution issued thereon real estate of the value of ten thousand dollars was sold for the amount of said judgment to the attorney for the plaintiff, who thereafter assigned the certificate of sale to the sheriff executing said writ, to whom a deed afterwards issued, and it appeared that no lien was established by said decree against the land, *held*, in view of the inadequacy of the consideration, that one who took a conveyance of the property pending the injunction proceeding, and who was not a party to such proceeding, nor had actual notice thereof, and commenced an action to set aside said sale and deed within a few days after said sale was made, was properly allowed to redeem said property upon the payment of the judgment and costs down to the time execution issued.

*Appeal from Polk District Court.*—HON. MARCUS KAVANAUGH, JR., Judge.

WEDNESDAY, OCTOBER 14, 1891.

THIS is an action in equity for a decree setting aside a sheriff's sale and deed of certain real estate. There was a hearing on the merits, and a decree for the plaintiff. The defendants appeal.—*Affirmed.*

*C. C. & C. L. Nourse*, for appellants.

*Cole, McVey & Clark*, for appellee.

ROTHROCK, J.—I. The property in controversy in the action is part of a lot, with a building thereon, situated on Walnut street, in the city of Des Moines. It appears in evidence that on the twenty-second day of March, 1886, the title to said real estate was in Joseph Lehner, the husband of the plaintiff, and that on that day an action in equity was commenced against certain occupants of the said building, charging them with keeping a saloon nuisance therein, and asking that the said nuisance be enjoined and abated. Joseph Lehner was made a party defendant. The record does not show what relief was asked against Lehner further than

appears from the appearance docket of the district court. It is stated therein that the action was against the tenants (naming them) and against "Joseph Lehner and building number 213, West Walnut Street, city of Des Moines." It further appears that Joseph Lehner filed a separate answer in the case on the fourteenth day of December, 1886. It does not appear what defense was interposed by this answer. The decree entered in the case ignored the answer of Lehner, and held him and his codefendants to be in default for want of an appearance to the action, and found that the tenant was keeping and maintaining a nuisance in the said building; that Lehner was the owner of the building, and had full knowledge and gave his consent to the use of said building for the maintaining of said nuisance; and enjoined such further use of the building. It was further decreed that the defendants should pay the cost of the action, including an attorney's fee of twenty-five dollars, and directed that "an execution will issue against said defendants and as against said building for the collection thereof." No special execution was issued upon the decree, but on the seventh day of November, 1887, a general execution was issued, and a levy was made on the part of the lot now in controversy; and on the seventeenth day of January, 1888, the lot and building were sold by the sheriff to A. A. Haskins, Esq., an attorney for the plaintiff, who is one of the defendants to this action, for thirty-one dollars and fifty cents, and a certificate of sale was issued to him, which he afterwards assigned to the defendant, J. C. Painter, who was sheriff when the sale was made. At the expiration of one year from the sale the sheriff then in office made and delivered a sheriff's deed to said Painter. After the action for an injunction was commenced, and while it was pending, and on the eighteenth day of June, 1886, the said Joseph Lehner conveyed the property to the plaintiff herein.

There is much in the case in the way of evidence and argument which is wholly immaterial, in that it neither establishes nor disproves any right of the parties, and which we need not discuss at length. We refer now to certain claims of the plaintiff that she was the real owner of the property, and that she had title at one time, and conveyed it to her husband for no consideration, and for the purpose of giving him credit, and enabling him to do business. But the fact remains that, after the alleged voluntary conveyance was made, and while the husband held the title, the action for an injunction was commenced. It is true, the plaintiff was not made a party defendant in that action, but she took the conveyance pending the action, and is charged with notice of what was claimed against the property. There is evidence to the effect that Littleton, the plaintiff in the suit, agreed with Joseph Lehner that the injunction suit should be dismissed. It is scarcely necessary to say that such evidence is entirely immaterial in an action to set aside the sheriff's sale and deed. Other immaterial matters need not be mentioned.

We will now proceed to an examination of such questions as appear to us to be material. *First.* The property in controversy is shown by the evidence to be worth ten thousand dollars. It was leased for a rental of one thousand dollars a year. It was sold by the sheriff for thirty-one dollars and fifty cents. *Second.* So far as can be ascertained from the evidence, there was no lien claimed in the injunction case against the land. The decree was against the building alone. *Third.* When the plaintiff took the property by the conveyance to her pending the injunction suit she was not charged with notice that any suit was pending affecting the title to the land, for the reason that no such claim was made. *Fourth.* The plaintiff is not shown to have any notice of the pendency of the injunction suit. It

is shown that she had no knowledge of the decree until after it was entered. *Fifth.* She commenced this action a few days after the sheriff's sale in question was made. It has been said, and we think it is the general rule, that inadequacy of consideration alone is not sufficient to vacate a sheriff's sale and deed. This rule is especially applicable where, as in this state, an execution creditor has a right of redemption of one year after a sale, and no complaint is made until after the execution of a deed. *Wallace v. Berger*, 25 Iowa, 456; *Sigerson v. Sigerson*, 71 Iowa, 476; *Peterson v. Little*, 74 Iowa, 223. In the case at bar the decree canceled and set aside the sheriff's deed upon the payment by the plaintiff into court of the sum of forty-seven dollars and forty cents, which was equal to the attorney's fee and costs down to the time the execution was issued. There are many considerations upon which we think the decree should be approved. Among them are the following: There was no lien established against the land. The plaintiff was not a party to the suit, and had no knowledge of it until after decree. This action was commenced very soon after the sale. There are no rights of third persons involved. The defendant Painter, assignee of Haskins, was the officer who made the sale. Exact justice is done by the decree. The officer who made the sale and the attorney receive all that was justly due them. When these and the other facts above mentioned are taken in connection with the gross inadequacy of consideration, it would shock the conscience for any court to transfer ten thousand dollars worth of property for a consideration of thirty-one dollars and fifty cents. Less than a half month's rent of the property would have paid the whole claim. The inadequacy appears to us to be so great as to strike the conscience strongly with the injustice of the transaction. In such cases it has always been held that, where there are other cir-

cumstances of an excusatory character on the part of the plaintiff, the gross inadequacy of consideration will establish the fraudulent character of the transaction. 10 American & English Encyclopedia of Law, 330, and cases cited. And see, also, Kerr on Fraud & Mistake, 186, 187, and Story on Equity Jurisprudence, secs. 244, 245.

The decree of the district court is AFFIRMED.

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## J. L. BRACKEN, Appellant, v. S. E. MCALVEY, Appellee.

**Limitation of Actions**: COMMENCEMENT OF ACTION: CONSTRUCTION OF STATUTE. In an action upon a promissory note properly commenced in a county other than that in which the defendant resides, as in the county where the note is, by its terms, made payable, the delivery of an original notice to the sheriff of such county, with the intention that it be served immediately, will be sufficient to stop the running of the statute of limitation as to said action, although the service of such notice was made upon the defendant in the county of his residence, after the action had become barred.

*Appeal from Tama District Court.*—HON. L. G. KINNE, Judge.

WEDNESDAY, OCTOBER 14, 1891.

THE plaintiff brings this action upon a promissory note dated December 15, 1875, due fifteen months after date, and payable "at First National Bank of Tama City, Iowa." The petition was filed March 19, 1887. The defendant demurred on the ground that the petition showed that the cause of action did not accrue at any time within ten years next prior to the commencement of this action. It was stipulated that in the con-

sideration of the demurrer "the following facts shall be considered by the court, which, for said purposes, are hereby agreed upon by the parties: *First.* That the 'original notice' herein was delivered to the sheriff of Tama county, Iowa, March 12, 1887, with the intention that it be served immediately; *second*, that the defendant was a resident of Grundy county, Iowa, at and before said notice was delivered to said sheriff, and ever since has been a resident of Grundy county, Iowa; *third*, that said notice was served on the defendant in Grundy county, Iowa, March 20, 1887, by C. F. McGee, who was specially deputized by said sheriff of Tama county, Iowa, to serve the same; *fourth*, that said defendant, had, for several years before the commencement of said suit, been a resident of Tama county, and the plaintiff, when he commenced said suit, supposed the defendant was a resident of Tama county, Iowa, and did not know he had removed to Grundy county." The demurrer being sustained, the plaintiff appeals.—*Reversed.*

*O. H. Mills*, for appellant.

*G. L. Bailey* and *Struble & Stiger*, for appellee.

GIVEN, J.—We have no argument or brief from the appellee. The question disclosed by the record is whether this action was commenced at the time the original notice was delivered to the sheriff, or not until the filing of the petition. If the former, then the action is not barred; and if the latter, then it is. The note is payable in Tama county; therefore, the action might properly be brought in that county; but the query remains, whether, in such case, the defendant being a resident of and served in another county, the delivery of the notice to the sheriff of Tama county was a commencement of the action. Section 2532 of the Code is as follows: "The delivery of the original

notice to the sheriff of the proper county, with intent that it be served immediately, which intent shall be presumed unless the contrary appears, or the actual service of that notice by another person, is a commencement of the action." The stipulation of facts concedes that this original notice was delivered to the sheriff of Tama county "with intent that it be served immediately." The action being brought in the proper county, the delivery of the original notice to the sheriff of that county was a delivery to the sheriff of the proper county, and, having been so delivered "with intent that it be served immediately," was the commencement of this action. As the action was not barred at that date, the demurrer should have been overruled. *Hampe v. Schaffer*, 76 Iowa, 563 (decided since the submission in the district court) is in point. REVERSED.

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SAMUEL LOOKABILL, Appellee, v. FOULKS BROS. & CO., Appellants.

**Practice in Supreme Court**: APPEAL: DISPUTE AS TO RECORD: ORIGINAL PAPERS: TRANSCRIPT. Where upon an appeal to the supreme court the appellee files an additional abstract denying the taking of an appeal in such cause, and contending that the evidence therein was not preserved by a bill of exceptions, and for that reason moves to strike the evidence contained in the appellants' abstract from the record; and the appellant in a printed paper filed denies the alleged grounds of such motion, and denies the averments of the additional abstract, the issue thus presented can only be determined by a transcript of the record, and the requirement for a transcript is not satisfied by filing in the supreme court certified copies of the original papers comprising the record in the district court.

*Appeal from Mills District Court.*—HON. GEORGE CARSON, Judge.

WEDNESDAY, OCTOBER 14, 1891.

ACTION at law to recover the possession of specific personal property. There was a trial by jury, and a verdict and judgment in favor of the plaintiff.—*Dismissed.*

*W. S. Lewis* and *Shirley Gilliland*, for appellants.

*L. T. Genung* and *P. P. Kelley*, for appellee.

ROBINSON, J.—The abstract filed by the defendant shows that issue was joined and a trial had upon the merits of the case; that evidence was introduced, a charge given to the jury, a verdict returned for the alleged value of the property in controversy, and a judgment for such value rendered in favor of the plaintiff. It also alleges that a notice of appeal was duly served on the attorneys for the plaintiff and the clerk of the district court. The plaintiff appeared in this court, and filed an additional abstract, in which he denies that the case entitled in the abstract was ever tried; denies that the plaintiff was ever a party to such an action; and denies all the averments of the abstract. The plaintiff admits that he was a party plaintiff in an action in the district court of Mills county, in which Foulks Bros. & Co., John. R. Foulks and Wilbur Foulks were parties defendant, but alleges that in that case the evidence was not preserved, and none of it is set out in the abstract of the defendants, and that the plaintiff cannot set out the evidence in that case, for the reason that it was not preserved. The plaintiff denies that any notice of appeal was ever served in the case last mentioned. The plaintiff has filed a motion to strike from the defendants' abstract the evidence therein contained, on various grounds, of which the material one is that it was never preserved and made of record, as required by law. The defendants, in a

printed paper filed in resistance of the motion to strike, deny the alleged grounds of the motion, and deny the averments of the additional abstract. No other denial is on file, but, treating that as sufficient to raise an issue, the controversy thus presented can only be determined by a transcript of the record. Rules of Practice of the Supreme Court, sec. 12. The defendants have caused to be certified to this court the original charge to the jury, motion for a new trial, skeleton bill of exceptions, translation of short-hand reporter's notes of evidence, and notice of appeal; but the only transcript we find is one of the ruling on the motion for a new trial and judgment. It was held in *Cox v. Macy*, 76 Iowa, 316, that this court cannot recognize the original papers as a substitute for the transcript, for the purpose of determining a controversy as to the contents of the record. Under the rule of that case, the plaintiff has not only failed to show that the abstract contains the evidence submitted in the district court, but has failed to show that an appeal has been taken. The case is, therefore, DISMISSED.

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# BRUMWELL & Co., Appellants, v. STEBBINS BROS. *et al.*, Appellees.

**Attachment:** WRIT AGAINST PARTNERSHIP PROPERTY: GARNISHMENT OF DEBT DUE INDIVIDUAL PARTNER. In an action against the firm of S. Bros. the plaintiffs filed an attachment bond payable to said firm, and caused a writ of attachment to issue against the property of the firm alone, under which was garnished a debt due to S. S. & Co., a partnership composed of two of the members of the firm of S. Bros. Subsequently the plaintiffs amended their petition making the individual members of the firm of S. Bros. parties, and praying a personal judgment against them, but no attachment was issued against their

property, and before such amendment was filed the garnishee had, with the consent of S. S. & Co., paid the amount for which he was indebted to one of the creditors of that firm. *Held*, that the writ of attachment authorized the attachment of the property of S. Bros. only, and that the garnishment did not entitle the plaintiffs to money due from the garnishee to S. S. & Co.

*Appeal from Woodbury District Court.*—HON. GEO. W. WAKEFIELD, Judge.

WEDNESDAY, OCTOBER 14, 1891.

THE plaintiffs claim a right to certain money in the hands of a garnishee paramount to that of certain interveners and others. On the final hearing a decree was rendered in favor of the interveners. The plaintiffs appeal.—*Affirmed.*

*Lutz & Sears*, for appellants.

*Lothrop & Doty*, for appellees.

ROBINSON, J.—At some time prior to the tenth day of September, 1888, James Stebbins, R. H. Stebbins, Sam Stebbins and George Freeland were engaged in business as copartners under the firm-name of Stebbins Bros. On the date named the plaintiffs commenced this action against Stebbins Bros. as a firm, the members not being named, and as grounds for attachment stated "that defendants [Stebbins Bros.] are about to remove their property out of the state without leaving sufficient for the payment of their debts; that defendants [Stebbins Bros.] are about to remove permanently out of the county, and have property therein not exempt from execution; and that they refuse to pay or secure plaintiffs." An attachment bond was filed, which was made payable to Stebbins Bros. as a firm, and a writ was issued against the property of the firm, but not against the individual property of its members. On the day after the action

was commenced a notice of garnishment was served upon A. Nystrom, requiring him to answer as to money or other property in his hands due or belonging to Stebbins Bros. as a firm. At that time Nystrom had in his possession money to the amount of four hundred dollars which was the individual property of Sam Stebbins & Co., a partnership of which Sam Stebbins and George Freeland were the only members. When the notice of garnishment was served, John Hornick, Needham & Co. and Conway & Hellman were creditors of Sam Stebbins & Co. Immediately after the service of the notice on him, Nystrom, by virtue of an agreement with Sam Stebbins & Co., paid the four hundred dollars in his hands to Hornick to be held in trust for Nystrom, so far as it should be required, to answer any order of court which might be made in the garnishment proceedings, and then to be held by Hornick for his own benefit, and for the benefit of the other creditors of Sam Stebbins & Co. In November, 1888, Needham & Co. and Conway & Hellman commenced actions on their respective claims against Sam Stebbins & Co., which were aided by attachment, and notices of garnishment were served on Hornick. Judgments were afterwards recovered in those actions for sums which amounted in the aggregate to three hundred and fifty-six dollars and sixty-four cents. Neither the original notice nor the writ of attachment in this action was served on Sam Stebbins or George Freeland. In November, 1888, Nystrom filed his answer to the notice of garnishment, denying indebtedness to the firm of Stebbins Bros., and denying that he had possession of any property which belonged to that firm. At the same time, Sam Stebbins and Freeland appeared and filed their petition of intervention, claiming the four hundred dollars in the hands of Nystrom as their property, and that no part of it belonged to the firm of Stebbins Bros. In January, 1889, the plaintiffs

filed an amendment to their petition, making the members of the firm of Stebbins Bros., including Sam Stebbins and Freeland, parties defendant, and asking a personal judgment against them; but no further notice or process of any kind was issued or served in the case. Sam Stebbins and Freeland answered the petition as amended, denying its averments, but judgment was subsequently rendered against them for the amount due the plaintiffs from Stebbins Bros. After that was done, the cause, so far as it related to the priority of liens, was transferred to the equity docket, and tried as in equity. The district court decreed that the four hundred dollars in controversy be first applied to the payment of the firm debts of Sam Stebbins & Co., to-wit, the debts due to Hornick, Needham Bros. and Conway & Hellman, in the order named,—the remainder, if any, to be paid upon the judgment in favor of the plaintiffs.

The plaintiffs insist that their judgment should be first paid. The question we are required to determine is whether the notice of garnishment issued in this action, and served on Nystrom, was effectual to hold the money in his hands for the payment of the claims of the plaintiffs. If it was, the decree of the district court was erroneous so far as it made the right of the plaintiffs junior to the claims of the creditors of the firm of Sam Stebbins & Co. A partnership is a distinct legal entity, capable of transacting business, making contracts, and of suing and being sued as such in the partnership name. Code, sec. 2553; *Richard v. Allen*, 117 Pa. St. 199; 11 Atl. Rep. 552. In *Mason v. Rice*, 66 Iowa, 174, a ground for attachment against all the defendants was stated in the petition, and a writ of attachment against their property was asked, but the condition of the attachment bond was that the plaintiff would pay such damages as the firm of which the defendants were members should sustain by reason of

the wrongful suing out of the writ, and the writ was issued against the property of the firm alone. The property of one of the partners was seized under the writ. This court held that such seizure was wrongful, for the reason that the name of the partner was not mentioned in the writ, that the bond was not designed for his benefit, and that his right of action was not on the bond, but against the officer who committed a trespass in taking his property. Applying the doctrine of that case to this, we must hold that the writ issued against Stebbins Bros. authorized the attachment of firm property only, and therefore, that the service of notice of garnishment on Nystrom did not create a right to have appropriated the money then in his hands which belonged to the firm of Sam Stebbins & Co. He was under no obligation to hold it to respond to any order which might be made in the garnishment proceedings, and, when he paid it to Hornick, the fact that he did so under an agreement by which it was to be used in satisfying any judgment which might be rendered against him gave the plaintiffs no right to have the money appropriated for their use. The agreement under which the money was paid to Hornick was made for the protection of Nystrom, and to secure the money for the creditors of its owner, and not in any respect for the benefit of the plaintiffs.

It is said that the appellees ought not to be permitted to question the sufficiency of the attachment, for the reason that no motion was made in the district court to discharge it. Since the service of the notice of garnishment was not effectual to hold the money, nor to create any liability on account of it, there was no attachment to discharge. Moreover, the validity of the alleged attachment was denied, and a release of the money asked by its owners in their petition of intervention, and it cannot be said that they have in any manner assented to or recognized it as of any legal force.

The decree of the district court settled the rights of the creditors of Sam Stebbins & Co. according to the agreement under which the money in controversy was paid to Hornick, and fixed the order in which their claims should be paid.

We find no error in the decree, and it is, therefore, AFFIRMED.

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# GREAT WESTERN TELEGRAPH COMPANY for the use of E. R. BOWEN, Receiver, Appellant, v. HIRAM PURDY, Appellee.

1. **Limitation of Actions:** CONTRACTS: SUBSCRIPTION TO CORPORATE STOCK PAYABLE IN INSTALLMENTS. Under a contract of subscription to stock in a corporation providing for payment of the same in installments "as the directors from time to time may order," if the authority of the board of directors be not exercised for more than ten years, the right of action for such installments will be deemed barred by the statute of limitations.

2. ———: ———: ———. Several years preceding the commencement of this action, in proceedings instituted for the appointment of a receiver of the plaintiff company, and in which the latter was a defendant, an order of court was made requiring assessments to be made upon the stockholders for the amount of their unpaid subscriptions to stock. *Held*, that the defendant not being a party to that proceeding, he was not bound thereby, and said order did not operate to stop the running of the statute.

*Appeal from Des Moines District Court.*—HON. CHARLES H. PHELPS, Judge.

THURSDAY, OCTOBER 15, 1891.

ACTION by the receiver of a corporation to recover against a stockholder an unpaid balance, due upon his subscription for stock. The case was tried without a jury, and a judgment rendered for the defendant. The plaintiff appeals.—*Affirmed.*

*Newman & Blake* and *Thomas J. Sutherland*, for appellant.

*S. L. Glasgow*, for appellee.

BECK, C. J.—I. On the sixteenth day of February, 1869, the defendant subscribed for fifty shares of the capital stock of the Great Western Telegraph Company, organized under the laws of the state of Illinois, in May, 1868. The par value of each share of stock was twenty-five dollars. Payments of installments were made upon the stock. In 1874 a receiver of the telegraph company was appointed. In 1886 a decree was entered in an action in the circuit court of Cook county, Illinois, ordering an assessment upon the stockholders for the unpaid stock subscriptions. The corporation was a defendant, and certain persons, who need not be named, were the plaintiffs. It does not appear that the defendant was a party to the proceedings. This action was commenced in 1889. The contract of subscription is in the following language:

1. LIMITATION of actions: contracts: subscription to corporate stock payable in installments.

"We, the subscribers hereunto, for value received, severally, but not jointly, agree to take the number of shares in the capital stock of the Great Western Telegraph Company placed opposite our respective names, and pay for the same in installments, to-wit, five per cent. on amount paid in, and the balance as the directors from time to time may order. In consideration thereof the Great Western Telegraph Company agree that, when forty per cent. of the par value of the shares shall have been paid under such orders, and the installment receipts therefor surrendered to the company, the number of shares severally subscribed by the undersigned shall be issued to them as full paid stock by the said company. T. C. Snow is appointed agent to solicit stock, and receive only the first installment of

five per cent. (fifty cents on a share) at the time of subscription.

J. SNOW,
"Secretary."

| Names. | Residence. | Date of subscription. | Number of shares. |
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| Hiram Purdy. | Burlington, Io. | February 16, 1869. | Fifty (50). |

In 1872 the executive committee of the board of directors of the telegraph company, by resolution, required the payment of all arrearages upon subscription to the capital stock of the company, and directed the secretary to notify the stockholders of this action, and to demand payment of all arrearages. It is not made to appear that the notices required were given to the stockholders.

II. The defendant pleads, as a defense, that the action is barred by the statute of limitations. In our opinion, this defense is sustained, and the action must fall. It will be observed that five per centum of the amount of the stock was payable when the subscription was made, and the balance was to be paid as the directors of the corporation should order. It may be assumed that this balance did not become due, and no action to recover therefor could be maintained until such an order had been made. It rested with the corporation, by proper orders and notices, or other acts, to acquire the right to maintain an action. It is the case of a creditor or obligee holding, by the terms of the contract, the power to acquire, by his own act, the right to maintain an action upon the contract. It is plain that this power must be exercised at a just and reasonable time, and not hastened or delayed to the prejudice of the other party. In the case before us, if the position of counsel for the plaintiff be correct, no act of the corporation was ever had requiring payment of the arrears due on the stock subscrip-

tion. It is claimed that the order for the payment of the stock was not sufficient, for the reason that it was made by the executive committee of the directors, and no notice thereof was given to the defendant and other stockholders. If counsel's position be correct, no demand or order for payment was made for fourteen years or more. Surely the law will not permit a party, by his own inaction, to defeat the statute of limitations. This statute does not commence to run until an action can be brought; that is, until the plaintiff acquired the right, by the terms of the contract, to commence a suit thereon. It is very plain that, by the terms of the contract, the corporation had the right, at any time, to institute the suit. But that right was to be exercised upon an order for payment and notice thereof. These acts thus pertain to the commencement of the action, being a part of the proceedings for the remedy, and depend upon the exercise of the will of the directors of the company, just as do the issuing of a notice or filing of a petition in the action. Surely, it would be wholly unreasonable to say that the company had not the right to commence an action, for the reason that it had not ordered payment and given notice thereof. In support of these views, see the following cases: *Baker v. Johnson Co.*, 33 Iowa, 151; *Prescott v. Gonser*, 34 Iowa, 175; *Hintrager v. Hennessy*, 46 Iowa, 600; *Squier v. Parks*, 56 Iowa, 407; *Ball v. Keokuk & N. W. Ry. Co.*, 62 Iowa, 751; *Lower v. Miller*, 66 Iowa, 408; *Hintrager v. Traut*, 69 Iowa, 746; *First Nat. Bank v. Greene*, 64 Iowa, 445.

III. It is insisted that the defendant is precluded by the order of the court made in 1886, requiring payment of arrears of the stock due from stockholders, for the reason that he is to be regarded as a party to that proceeding. But he was not in fact such a party. The record does not show that he was, and the law did not require

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that he should be made a party to the proceeding wherein the receiver was appointed. The court, by its order, assumed to do what the company thought its directors were required to do. The directors, in calling in payments for the stock, were not required to notify the stockholders of their proposed action, and give them an opportunity to appear and object. They were probably entitled to notice thereof after the order for payment, but not to notice before it was made. In our opinion, the action of the plaintiff is barred by the statute of limitations. Other questions in the case need not be considered. AFFIRMED.

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## CHARLES G. MATHEWS *et al.*, Appellants, v. W. L. CULBERTSON *et al.*, Appellees.

1. **Revenue Laws:** DEEDS: EVIDENCE. The records of conveyances of real estate, executed at a time when the internal revenue laws required that stamps be attached thereto and canceled, are admissible in evidence without proof that stamps were affixed to the originals, as provided by law, unless it appears that such stamps were omitted with the purpose to defraud.

2. **Tax Titles:** REDEMPTION: LACHES: ESTOPPEL. Where the owner of real estate, knowing that the taxes for which the same had been sold at tax sale were illegal, remained silent as to such fact for nearly twenty years, while the holder of the tax deed under such sale, and his grantees, paid the taxes on said real estate, occupied and improved it, and made no adverse claim to the property, and, by reason of his laches, it has become doubtful whether those claiming under the tax sale can produce the evidence which is necessary to a fair presentation of the case on their part, the right of redemption of such owner, and of those claiming under him with knowledge of the above facts, will be deemed barred in equity, and they will be estopped from asserting any claim to said property adverse to the title based upon such tax sale.

*Appeal from Sioux District Court.*—HON. GEORGE W. WAKEFIELD, Judge.

THURSDAY, OCTOBER 15, 1891.

ACTION in equity to quiet the title to four hundred and sixty acres of land in Sioux county, claimed by the defendants under certain tax deeds. After a hearing on the merits, a decree was rendered in favor of the defendants. The plaintiffs appeal.—*Affirmed.*

*Pitts & Kessey*, for appellants.

*H. E. Long*, for appellees.

ROBINSON, J.—The land in controversy was patented to one Horace M. Peck, in the year 1859. The appellants claim that Peck conveyed the land to one Uriah Upjohn by a deed which was recorded in Sioux county in the year 1863; that Upjohn conveyed it to William H. Stanley by a deed which was recorded in the year 1866; and that Stanley conveyed it to the plaintiff Mathews in the year 1868. In October, 1884, Mathews entered into an agreement with his coplaintiff, G. W. Pitts, to convey to him the land for the consideration of twenty-three hundred dollars, of which three hundred and ninety-five dollars was paid in cash. The agreement provided that Mathews should have no personal claim against Pitts for the unpaid portion of the consideration. The defendants claim that the land was sold on the third day of August, 1868, by the treasurer of Sioux county, for the delinquent taxes of the years 1865 and 1866; that tax deeds were issued therefor to William H. Gurley on the twenty-fourth day of August, 1871, and recorded on the next day; that Gurley executed a conveyance for a portion of the land to Laura Chamberlain in June, 1874, and that in October of the next year she executed a reconveyance for a portion of it to Gurley; that in the year 1878 she and Gurley joined in a conveyance of all the lands in controversy to Josiah L.

Lombard. Lombard took actual possession of it in 1878, and in that and the following year built a house thereon, broke a portion for cultivation, and made other improvements. In May, 1881, he executed a conveyance of the land to the defendant, W. L. Culbertson, and in October of the same year Culbertson executed a conveyance therefor to his codefendant, C. O. Boynton. The latter, in a counterclaim, asks that the title to the premises be quieted in him. The district court found in favor of the defendants, dismissed the petition of the plaintiffs, and decreed the title to be in Boynton as prayed.

I. The appellees contend that the appellants have failed to show that title to the land in controversy ever vested in Mathews. To prove the deeds of Peck to Upjohn, and of Upjohn to Stanley, the plaintiffs introduced copies of the records of Sioux county. The defendants objected to them on the ground that they did not show that the original deeds were stamped as required by the internal revenue laws of the United States. The records do not show that stamps were not attached to the deeds, and canceled; hence, if it be conceded that the revenue laws referred to were applicable to the deeds when recorded, the objection of the appellees is not well taken, for reasons stated in *Collins v. Valleau*, 79 Iowa, 626, 631.

1. REVENUE laws: deeds: evidence.

II. The appellants contended that the tax deeds to Gurley were void for numerous alleged reasons, among which are the following: That no assessments of the land were made for the years 1865 and 1866; that no taxes were levied for either of those years; that there were no officers in Sioux county charged with the duty of assessing property and levying taxes in either of those years; that no delinquent tax, for the year 1865, nor for the year 1866, was entered upon the tax list of

2. TAX titles: redemption: laches: estoppel.

1867; that no notice of the sale was given as required by law; that no valid tax sale could have been held on the third day of August, 1868, for the reason that the tax sale was adjourned from the first Monday of June to the first Monday of August, 1868, a period of more than two months; that no sale was in fact held on the third day of August, 1868; that the amount paid by Gurley was less than one-third of the amount of the sale, as shown by the certificates; that Sioux county paid Gurley a large sum of money to redeem the land from the sale, on the ground that it was erroneous.

We do not find it necessary to decide the questions thus presented by the appellants, for the reason that the case must be determined on other issues. Mathews took a mortgage on the land about the year 1862, and in the year 1867 he visited Sioux county to learn what he could in regard to it. He was then informed of the taxes on account of which the tax deeds in controversy were issued, and was told by a person who claimed to have held some office in the county that the taxes were illegal. In the spring of the year 1868, the debt secured by the mortgage not having been paid, he took a conveyance of the land in payment. In the year 1875 he again visited Sioux county, and ascertained that Gurley had obtained tax deeds for the land and had paid the taxes. He did nothing, however, but record his deed from Stanley. In the year 1878 he made a third visit to Sioux county, and learned that some breaking had been done on the land. After that time he had considerable correspondence with different persons in that county in regard to the land, and, as he says, was kept sufficiently posted for his purposes. In the year 1884 he entered into the agreement with Pitts heretofore mentioned, and in November, 1887, this action was commenced. When Lombard purchased the land he had no knowledge that Mathews was asserting title to it. The same is true of Culbertson. The tax deeds

under which Gurley claimed were regular on their face, and neither Lombard nor Culbertson had actual knowledge of any fact which should have led them to question the validity of the tax title. They obtained conveyances of the land, and took possession of and improved it in good faith. After Culbertson purchased, he learned of Mathews' claim, and visited him in Missouri; but the knowledge he thus acquired came too late to be of any value to him. Mathews never paid any taxes on the land. With information, as he claims, received in 1867, that the taxes for which the land was sold were illegal, he was silent while others discharged the duty which he says, in effect, was his, of paying the taxes on the land for nearly twenty years. He knew that they were paying the taxes, and he also knew that the land was being occupied and improved by persons claiming the tax title. It is clear that his silence and his apparent acquiescence in the loss of his title, by means of the tax deeds, misled Lombard and Culbertson, and induced them to believe that he was making no claim to the land. They did not know of the alleged defects in the title they purchased. Some of them, we are satisfied, did not in fact exist, and the truth as to others it is now difficult, if not impossible, to ascertain. No assessor's books can now be found for the years 1865 and 1866. The same is true of the record of proceedings of the board of supervisors for the time prior to June, 1866. Persons who were residents of the county in the years 1865 and 1866 testify that they had no knowledge of an assessment of the property in the county for those years, and that, so far as they knew, there was no board of supervisors. Others testify that there was no tax sale within their knowledge in August, 1868.

The evidence shows quite satisfactorily that a record of the proceedings of the board of supervisors has been lost. For several years all the county records

were kept in a very irregular manner. There was no court house nor other public place in which to transact the business of the county. The records were kept and the business was transacted in a room of a private dwelling-house, which was occupied as a living and sleeping apartment by members of the family. There was no safe, case or other proper means of preserving the records. In January, 1872, a large number of unauthorized persons seized the records which were then at Calliope, and carried them, without much care for their preservation, across the country, in stormy and windy weather, some twenty-five miles, to Orange City. A few days later they were returned to the county officers at Calliope. In view of the manner in which the records have been kept and used, it is not strange that some are not to be found; and whether the assessor's books have been lost, or whether they never existed, cannot now be ascertained from the record submitted to us. The testimony of witnesses as to what was done in the county during the years in question, and in regard to the county officers and county records, is not satisfactory. One of those upon whom the appellants chiefly rely is contradicted by evidence he gave in another case, and his testimony is shown not to be reliable. Another, who testifies to material matters, admits that he was frequently away from Calliope, and that official acts might have been done without his knowledge. It is clear that the organization of the county was preserved, and that efforts were made to have the necessary offices filled; also that persons were in fact acting as members of the board of supervisors, as clerk, treasurer and as other officers. There was an attempt made to observe the requirements of the law in selling the land and issuing the deeds in controversy. In what respect, if any, the attempts failed, it is now difficult, if not impossible, to ascertain; and, in the absence of satisfactory proof to

the contrary, we must presume that all things necessary to the validity of the sale and the tax deeds subsequently issued were done. Had Mathews acted with reasonable diligence to protect his interests, the truth of the material matters in issue could have been ascertained with reasonable certainty. But the record fails to show any facts which tend to justify his course. It is evident that he kept himself informed in regard to the land and the acts of the tax-title claimants, with the purpose of asserting title, should it be for his interest to do so at any time; otherwise to take no steps to recover the land. He supposed that the tax titles were defective, but he had reason to believe that Lombard and Culbertson had no knowledge of the alleged defects. His silence operated as a fraud upon them and their grantees. His course cannot be defended on any equitable ground, and it is contrary to public policy, which requires of each citizen promptness in discharging his duties to the government, and good faith in his conduct which affects the rights of others. His coplaintiff is not in any sense an innocent purchaser, and we do not understand him to claim any right which Mathews could not have asserted had their agreement not been made. He knew the facts in regard to the claim of Lombard and Culbertson before he entered into the agreement, and was careful to provide that Matthews should have no personal claim against him for the unpaid portion of the purchase price. In some respects, this case is like that of *Baird v. Ellsworth*, 81 Iowa, 629, and much of what was said in that case is applicable to this.

The appellants insist that their claim is not barred by the statute of limitations, and, therefore, that the appellees ought not to succeed. It has been said that nothing will cause a court of equity to act but conscience, good faith and reasonable diligence. "When these are wanting, the court is passive, and does noth-

ing." *Earl of Deloraine v. Browne*, 3 Brown Ch. 640. When, by reason of the laches and delay of the complainant, it has become doubtful whether the other parties can produce the evidence which is necessary to a fair presentation of the case on their part, or when it appears that they have been misled to their disadvantage by such conduct, a court of equity will deal with the remedy as if barred. In such cases, the court acts in obedience to the spirit of the statutes of limitation, and adopts the reasons and principles on which they are founded, rather than their literal requirements. *Lawrence v. Rokes*, 61 Me. 42; *Richards v. Mackall*, 124 U. S. 183; 8 Sup. Ct. Rep. 437; *Sullivan v. Railroad Co.*, 94 U. S. 806; *Badger v. Badger*, 2 Wall. 87; *Haff v. Haff*, 54 Mich. 511; 20 N. W. Rep. 563; *Weiss v. Bethel*, 8 Or. 528; *Phillips v. Rogers*, 12 Metc. (Mass.) 411; *Tuttle v. Willson*, 10 Ohio, 27; *Gibbons v. Hoag*, 95 Ill. 69. See, also, *Withrow v. Walker*, 81 Iowa, 651, and cases therein cited; *Foster v. Bigelow*, 24 Iowa, 380.

We conclude that the appellants have failed to make that showing of merit and diligence which is required to justify the interference of a court of equity in their behalf. Moreover, we think the conduct of Mathews has been such that the appellants must be held estopped to assert any claim against the title of the appellees. Some objection is made to the sufficiency of the proof to show title in the appellees. In view of the conclusion we have reached as to the claim of the appellants, the proof is sufficient to sustain the decree of the district court. The questions determined are controlling, and we do not find it necessary to determine others presented. AFFIRMED.

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# JULIUS C. ILER *et al.*, Appellees, v. HENRY W. GRISWOLD *et al.*, Appellants.

1. **Purchase of Lands:** FRAUD: DAMAGES: EQUITABLE RELIEF. The defendant M., having secured an option for the purchase of certain lands from one W. at a price named, entered into an agreement with the plaintiffs and his codefendants for the purchase of said lands jointly, wherein the defendant G. was authorized, as trustee for the other parties to the contract, to take the title to said lands and pay W. therefor a sum equal to twice the amount agreed to be paid by M., it being represented by M. and G. that such sum was the price asked by W. The purchase having been consummated at the option price made to M., and the difference between that sum and the price which G. was authorized to pay under said contract having been converted by M. and G. to their own use, the plaintiffs brought this action to quiet the title to the property in themselves. *Held*, that the court having denied the specific relief asked by the plaintiffs, it properly rendered judgment against M. and G. for the proportion of the excess over the option price paid by the plaintiffs.

2. **Practice:** EQUITY CAUSE: AWARD OF DAMAGES. Where, in an equity cause. an answer is filed by the defendant, and the plaintiff is found to be entitled to equitable relief, but the rights of the parties can be more definitely measured by an award of damages, the court may grant such relief as would be consistent with the case made by the petition, and embraced within the issue, were the action at law.

*Appeal from Pottawattamie District Court.*—HON. A. B. THORNELL, Judge.

THURSDAY, OCTOBER 15, 1891.

ACTION to quiet title and for general relief. From a judgment for the plaintiffs, the defendants appeal. *Affirmed.*

*Harl & McCabe*, for appellants.

*Scott & Scott*, for appellees.

GRANGER, J.—The plaintiffs in the case are Julius C. Iler, H. E. Gates, C. J. Schmidt and Mary A. Fried. The defendants are H. W. Griswold, O. P.

McKesson, N. P. Stoddart and Charles Hunt. Prior to the commencement of the suit, the parties, both plaintiff and defendant, agreed among themselves upon a joint purchase of forty acres of land, near Council Bluffs, Iowa. A conference led to the selection of H. W. Griswold as a trustee to effect a purchase, receive the title, and do other things for and on behalf of the purchasers. The conveyance of the land to Griswold as trustee was by one Isham Wright, and the consideration therefor was four thousand dollars. Before the agreement of the purchaser to make the purchase the defendant McKesson had alone conferred with Wright, and secured his terms, and, as claimed by the appellants, secured an option on the land for a certain time. The price paid for the land by what, in argument, is called a "syndicate" was eight thousand dollars; and the relief sought in the action is based upon the claim that Griswold and McKesson represented to the syndicate that the purchase price from Wright was eight thousand dollars, whereas, in fact, it was but four thousand dollars; and that Griswold and McKesson wrongfully profited to the extent of the four thousand dollars paid in excess of the actual purchase price.

That the price paid for the land by Griswold, as trustee, was four thousand dollars, is not questioned; nor is it disputed that eight thousand dollars was paid by the syndicate, and that McKesson received one-half of it. The claim of the appellants is "that the syndicate purchased McKesson's option in the land, for which he was entitled to the difference between the purchase price to Wright and the price fixed upon his option, eight thousand dollars." The district court found the transaction fraudulent as against the plaintiffs, Gates and Schmidt, and gave to each a judgment against Griswold and McKesson for five hundred dollars, and certain costs; and the appeal is by Griswold and McKesson alone, from such judgment.

I. The testimony fully justifies the finding of the district court that the plaintiffs, Gates and Schmidt, are entitled to relief of some kind. What the relief should be we will notice hereafter. Without reviewing the testimony showing the facts, it is a plain case of imposition and fraud. Gates and Schmidt believed, and had reason to believe, that they were entitled and became parties to a transaction in which all the members were to share equally, and that the trustee of their choice was to act for all alike, and not where one or more of the members of the syndicate were, under cover of a secret option right, to profit at the expense of the other members, and this is exactly what was done. It is true they paid no more than they understood they were to pay, and it is urged that because of that there was no fraud or damage for which damages are obtainable at law or in equity. But can we sustain such a claim? Conceding, as we find the fact to be, that Gates and Schmidt agreed to become joint purchasers of the land under representations that Wright's price for the land was eight thousand dollars, when in truth it was but four thousand dollars, and that members of the syndicate, whom they believed were to share equally with them, have taken the money paid by them under the belief that it was necessary to secure the land, and is there not both fraud and damage? Nothing more can consistently be claimed than that they were to pay their proportion of what would buy the land from Wright, and whatever they paid in excess of that was taken from them by false representations, and in the transaction they were certainly damaged to that extent. It is urged that this property was every day increasing in value, and complaint is made of the action of the district court because there was no proof to show that the land was of less value than was paid for it, and authorities are cited in support of a rule

1. PURCHASE of lands: fraud: damages: equitable relief.

that fraud without damage "is no ground for remediable jurisdiction, legal or equitable." But this is not a case of that character. As we have held, Gates and Schmidt were purchasers from Wright, and not from McKesson, and, no matter how great the actual value of the land, they were entitled to all the advance over the actual price to Wright, and, in so far as the fraud of the defendants deprived them of such advance, they were damaged. In consequence of the fraud they each paid, or obligated themselves to pay, just twice as much for the land as they should have paid, which was five hundred dollars each, and the district court so found.

II. The specific relief asked in the petition was to have the title to the land quieted in the plaintiffs. This the district court, in effect, denied, and ordered a money judgment, and the right so to do is questioned, and reference is made to *Richmond v. Dubuque & S. C. Ry. Co.*, 33 Iowa, 489. The case only holds that, where a party is entitled to no equitable relief, relief as in a law action cannot be given. But in this case the plaintiffs were certainly entitled to equitable relief, but, because of the peculiar situation of the case as to parties and the property, it could be more definitely measured or determined by way of damages than by some equitable apportionment or division of the land, and the action of the court in this respect is legal. Code, section 2855, provides: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his petition. But in any other case the court may grant him any relief consistent with the case made by the petition, and embraced within the issue." To our minds the judgment of the district court reflects justice, which should be the guiding star of judicial inquiry, and it is AFFIRMED.

2. PRACTICE: equity cause: award of damages.

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# GEORGE R. SANDERSON, Appellant, v. TINKHAM SMOKE CONSUMER COMPANY, Appellee.

1. **Agency**: COMMISSIONS: CONTRACT: CONSTRUCTION. Under a contract by which an agent agreed to solicit orders for a machine in consideration of the payment of a certain percentage of the amount for which he obtained purchasers for such machine, payable when the orders were received, the principal is not liable for the payment of commissions upon verbal promises obtained by the agent to purchase such machine, if upon a demonstration to be made the same would accomplish what was claimed for it.

2. ———: ———: ORDERS: ACCEPTANCE BY PRINCIPAL: POWERS OF OFFICERS OF CORPORATION. The plaintiff having admitted in his testimony that his commissions were payable only when the orders obtained by him were accepted by the principal, which was a corporation, *held*, that a mere mental acceptance of orders by the president of the company would not render the principal liable for commissions upon orders which were of a character that the company was not bound to accept, and which were rejected by its officers when acting together.

*Appeal from Des Moines District Court.*—HON. CHARLES H. PHELPS, Judge.

THURSDAY, OCTOBER 15, 1891.

THIS is an action at law to recover on an alleged contract by which it is claimed the plaintiff is entitled to certain specific sums as commissions for effecting sales of a device for consuming smoke and saving fuel in the operation of steam-engines. There was a trial by jury, and a verdict and judgment for the defendant. The plaintiff appeals.—*Affirmed.*

*A. M. Antrobus*, for appellant.

*C. L. Poor*, for appellee.

ROTHROCK, J.—I. The defendant is a corporation. It appears that one Tinkham invented or discovered a device or appliance which, it is claimed, when attached to the furnaces of steam-boilers, consumed the smoke from the burning fuel, and was a great saving of expense in the operation of machinery. It does not appear who were stockholders in said corporation. The officers at the time it is claimed the cause of action accrued were W. R. Smith, president, Tinkham, vice-president, and R. O. Simmons, secretary and treasurer. These persons, with F. O. Simmons, constituted the board of directors. The plaintiff claims that about the twenty-seventh day of February, 1889, he entered into a verbal contract with said Smith, by which the plaintiff bound himself to go to Little Rock, Arkansas, and Memphis, Tennessee, and solicit orders for the defendant's smoke consumer; the plaintiff to pay his own expenses, and to receive from the defendant corporation for his services fifty per cent. of the amount for which he obtained purchasers, unless he found purchasers for appliances for less than three or four boilers in one locality, in which case he should be entitled to but forty per cent. thereof; and that the plaintiff's compensation should be payable when the orders or contracts for the work were taken. The plaintiff claims that he did go to the places named, and secured purchasers for enough of said devices to make commissions due to him from the defendant in the sum of six hundred and eighty-two dollars and fifty cents. This is the main cause of action.

1. AGENCY: commissions: contract: construction.

There is an additional or second count in the petition, in which the plaintiff claims that he made verbal contracts or procured verbal promises from other parties to purchase said device if, upon a "demonstration" to be made, the same would accomplish what was claimed for it, and that the plaintiff was entitled

to recover as commissions upon the last-named prospective orders in the sum of twenty-one hundred dollars. The court instructed the jury that there could be no recovery therein. This instruction was correct. There was no evidence upon which a recovery of commissions could be based upon these so-called contracts. This is so manifest that we ought not to consume time in discussing the claim made touching its validity.

II. The other ground of complaint was submitted to the jury. It appears from the testimony of the plaintiff, as a witness, that it was a mistake as alleged in his petition that the orders which he succeeded in taking for the device were to be paid for when the orders were taken. He claimed, on the trial as a witness, that the commissions on said orders were to be paid for when they were approved and accepted by the defendant. It is claimed that the oral contract relied on was made with Smith, the president of the corporation. It is not claimed that any other officer of the corporation co-operated with Smith in making the contract. Smith sold out his interest in the business before this suit was commenced. He testified as a witness that the orders were accepted by the company. He did not state that there was any written acceptance. What he evidently intended to state was that he accepted the orders for the company. If he did, it was by a mere mental resolution, not expressed. Most of the orders were not such as the company was bound to accept, and the evidence is almost without dispute that the officers, when acting collectively, refused to accept the orders. We know that counsel, with great zeal and ingenuity, present certain acts, declarations and letters in which it is claimed that they acquiesced in the oral contract after it was made. But the argument does not bear investigation, when all the evidence is considered. Moreover, if this were a case triable

2. ——: ——: orders: acceptance by principal: powers of officers of corporation.

anew here, we would find from the mode of doing business of the company, which was to pay commissions to agents when the purchaser paid for his smoke consumer, and from certain letters written by the plaintiff, and which appear in appellee's abstract, that just that kind of a contract was made by Smith with the plaintiff. But there was a conflict in the evidence on this question, and we need not further consider it. As we read the record, it was incumbent on the plaintiff, in order to recover commissions, to prove that the orders were accepted and approved. Upon this question we think the plaintiff utterly failed in producing evidence upon which to base a verdict. This being our view of that question, it is an end of the case. It would not have been error if the court had instructed the jury to find for the defendant.

The case demands no further consideration. AFFIRMED.

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LETTS, FLETCHER & CO., Appellants, v. MCMASTER & DRYDEN *et al.*, Appellees.

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1. **Partnership**: MORTGAGE: POWER OF ONE PARTNER TO EXECUTE ON FIRM PROPERTY TO CREDITOR. Where one member of a firm, without the knowledge or consent of his copartner, executed a chattel mortgage upon a part only of the property of the firm to secure a partnership indebtedness, and such action was afterwards acquiesced in by the other partner, the latter claiming, and having previously exercised, the same authority, and the chattel mortgagee soon afterwards took possession of the mortgaged property, and proceeded to dispose of the same and to apply the proceeds upon the indebtedness secured by such mortgage, *held*, that the mortgage was valid as against a subsequent attaching creditor of the firm.

2. **Fraudulent Conveyances**: SECRET LIEN: EFFECT ON SUBSEQUENT CONVEYANCE. Some time before the execution of the mortgage above referred to the mortgagee had received a mortgage upon the firm's

property to secure a part of the same indebtedness, but the same was never recorded, and when the mortgage in question was accepted the indebtedness under the former mortgage was included therein, and that mortgage surrendered. *Held*, that, as the mortgagees were claiming nothing by virtue of the former mortgage, the secret character of that lien could not affect the validity of the mortgage last executed.

3. ———: FAILURE OF MORTGAGEE TO TAKE POSSESSION OF PORTION OF PROPERTY. A part of the property included in the above mortgage consisted of forty hogs, which had been purchased by one D., with money borrowed of I., C. & L. for that purpose, under an agreement that they were to be shipped to Sioux City, sold, and the profits divided between said D. and the defendant firm. The hogs having sold for sufficient only to pay the loan, the entire proceeds were paid to I., C. & L. *Held*, that the mortgagees were not accountable for the value of the hogs, and their action was no evidence of fraud.

4. **Mortgages**: GENERAL ASSIGNMENT: INTENTION OF MORTGAGOR. The defendant firm, being insolvent, executed to one of its creditors a chattel mortgage upon a part of its property to secure a *bona fide* indebtedness, and on the next day executed four other mortgages to creditors of the firm, without their knowledge, upon a part of the same property, and thereafter the mortgagees under the first mortgage took possession of the property and disposed of the same. At the time the first mortgage was given the mortgagors had no thought of giving the four mortgages subsequently executed. *Held*, that the mortgages, being separate in point of time, and not connected by intention or circumstance, they could not be construed as a general assignment with preferences, and, therefore, void.

*Appeal from Monona District Court.*—HON. GEORGE W. WAKEFIELD, Judge.

THURSDAY, OCTOBER 15, 1891.

THE plaintiff brought this action against the defendants to recover sixteen hundred and thirty-four dollars and thirty-five cents on account for merchandise, for which judgment was subsequently rendered. An attachment was sued out, and J. W. Bickford, cashier of the First Ute Bank, was garnished as a supposed debtor of the defendants; and, having answered, issue was joined upon his answer, and upon his motion the case was transferred to the equity docket, and tried as an equity cause, and judgment entered in favor of the garnishee, from which the plaintiff appeals.—*Affirmed.*

*Binford & Snelling* and *McMillan & Kindall*, for appellant.

*Charles MacKenzie*, for appellee.

GIVEN, J.—I. No exceptions were taken to the ruling of the court transferring the case to equity, nor any objections made to trying it as an equity cause when called for trial. We are not called upon to determine whether the transfer was proper or not, and the parties having thus submitted their case as in equity it will be so considered on this appeal.

II. The following, with what is hereafter mentioned, will be a sufficient statement of the facts to show the question involved: On and for some time prior to October 24, 1888, I. C. McMaster and W. H. Dryden were partners in business at Castana, Monona county, Iowa. Their business consisted in keeping a retail store of general merchandise, a grocery store and meat market combined, a slaughter-house and stock yard, and in buying and selling stock. They transacted businesss through the First Ute Bank and the Dunlap Bank. Mr. Dryden having visited Dunlap and Ute to ascertain the indebtedness of his firm to these banks, and finding it to be larger than he expected, and more than the firm could meet in the usual course of business, and being pressed by the banks for security, did then, October 24, 1888, on behalf of the firm, and without the knowledge or consent of his partner, execute and deliver a chattel mortgage to the appellee. The mortgage is upon all the merchandise, furniture, tools, hay and feed in the store, grocery and meat market, slaughterhouse and stock yard; also eighteen cows, one calf and two three-year-old steers in the slaughterhouse yard, and on forty head of hogs, and one sorrel horse. The mort-

1. PARTNERSHIP: mortgage: power of one partner to execute on firm property to creditor.

gage was given to secure the payment to the appellee of four promissory notes, two to S. J. Patterson, vice-president of the Ute Bank, dated August 21, 1888, and two to J. W. Bickford, dated August 24, 1888. One of said notes was for thirty-three hundred and ninety-one dollars and fifty-three cents, payable February 21, 1889; one for six hundred and seventy-one dollars and eighty-nine cents, payable February 25, 1889; one for fifteen hundred and seventy-five dollars and sixty-six cents, payable November 3, 1888; and one for one thousand dollars, payable October 27, 1888; all bearing interest at ten per cent. The mortgage was executed at Ute, and after delivery was turned over to Mr. Dryden to carry to Onawa (where he was going), to file it for record. On the following day, October 25, Dryden executed, on behalf of the firm, four other mortgages to creditors of the firm, without their knowledge, on the same merchandise in the store. On that day he handed the five mortgages to the recorder, with directions not to file them until further directed; and on the following day directed the recorder to file the one to the appellee as of October 25, and the others as of the twenty-sixth, and they were so filed and recorded. On October 27, 1888, the appellee took possession of all the property described in the mortgage excepting the forty hogs, eighteen cows, one calf and two steers, and the hay and feed, and proceeded to dispose of the same as authorized by the mortgage, and was so engaged when served with notice of garnishment. After the appellee took possession, certain parts of the merchandise were taken from him by writs of replevin. The property taken and held by the appellee was not sufficient to satisfy the mortgage debt by a considerable sum.

The appellant's first contention is that the mortgage operated as a complete transfer and assignment

of the firm property, and totally destroyed and wound up the business, and, therefore, Dryden had no authority to execute the same without consulting his copartner; wherefore the mortgage is absolutely void. It was not a complete transfer of the property. The appellee did not take complete title to it, but only the right to take, sell and apply as provided in the mortgage. Other creditors had a right to take the property from the appellee by paying the debt secured by this mortgage, as provided in chapter 117, Acts of the Twenty-first General Assembly. No doubt Dryden knew that giving this mortgage would stop their business, but this was no reason why he might not honestly pledge the firm property to secure a firm debt, nor why the appellee might not demand and accept such security. *Loeb v. Pierpoint*, 58 Iowa, 469; *Hunter v. Waynick*, 67 Iowa, 555, are cited as showing want of authority in Dryden to make this mortgage. In the former case one partner undertook to make a general assignment for the benefit of creditors against the objection of the other partner, and, in the other, one partner attempted to sell the entire property and business of the firm without the consent of the other partner. This mortgage did not cover all the property of the firm, and was given to secure a debt, a large part of which was contracted by the absent partner, and giving the mortgage was always afterwards acquiesced in by him. It is not questioned but that Dryden had the usual authority possessed by partners. McMaster testifies that he had authority to execute mortgages to secure firm debts,—an authority which, it will be seen further on, McMaster had previously exercised. We are in no doubt but that Dryden did have authority to execute mortgages for and on behalf of the firm, on its property, to secure firm debts.

III. Appellant's further contention is that the mortgage was executed under a fraudulent combination

2. FRAUDULENT conveyances: secret lien: effect on subsequent conveyance.

and conspiracy between W. H. Dryden, S. J. Patterson, vice-president, and J. W. Bickford, cashier, and is, therefore, void for fraud. One circumstance relied upon as showing fraud is that the defendant McMaster had a settlement with the appellee in August, 1888, and executed the firm note for thirty-three hundred dollars, the balance found to be due to the appellee, and a mortgage on the firm's merchandise to secure the note. This mortgage was not placed on record, and upon giving the mortgage in question this debt of thirty-three hundred dollars was included therein, and the unrecorded mortgage surrendered. If the appellee was claiming anything under this unrecorded mortgage, then what is said with respect to giving a secret lien on property, and the authorities cited, would be in point; but the appellee is claiming nothing by virtue of that mortgage, and the situation between the parties is the same as if that mortgage had never been given. By its surrender, the appellee waived all rights under it. We may add that it does not appear that the mortgage was withheld from record in pursuance of any agreement, nor at the solicitation of the mortgagor, as in *Standard Paper Co. v. Freie Presse Co.* 30 N. W. Rep. (Wis.), relied upon by appellant.

IV. In the settlement October 24, 1888, a draft that day given by McMaster & Dryden to S. J. Patterson for seven hundred and ninety-three dollars, on the First Ute Bank, was accepted and paid, and included in the two notes that the defendant executed to the appellee. This draft was to Patterson, as cashier of the Bank of Dunlap, and in payment of a note held by that bank. The appellant contends that this note was the individual debt of McMaster, and not the debt of the firm. The testimony as to the origin of this debt is confused, but we think the weight of the testi-

3. ——: failure of mortgagee to take possession of portion of property.

mony is in favor of the conclusion that, whatever the origin may have been, the note paid by this draft was the note of McMaster & Dryden. If it were otherwise the appellant would not be prejudiced, as it is very clear that the property which came into the hands of the appellee was insufficient to satisfy the other part of the mortgage debt.

Another circumstance relied upon as showing fraud is that the appellee did not take possession of all the property described in the mortgage. The forty hogs had been purchased by one W. A. Dryden with money furnished by Ingerson, Carrabine & Lye, of Sioux City, for that purpose, and were shipped to Sioux City, sold, and the proceeds turned over to the party furnishing the money. They were purchased and shipped by W. A. Dryden under an agreement that he was to have half the profits, and McMaster & Dryden the other half. It does not appear that there were any profits, or that anything ever came to the appellee from the transaction. There is nothing to show what became of the twenty-one head of cattle, hay and feed at the stock yard, and the horse. It does appear, however, that no part of this property ever came into the hands of the appellee. We think the testimony fails to show fraud in the taking of this mortgage, and that the appellee is only accountable for the property that actually came into his hands It is a well-settled rule that liability will never be presumed against a garnishee, but must be affirmatively shown.

V. The appellant's further and last contention is that the execution of the mortgage in question "was a part of a transaction which, taken as a whole, amounts to a general assignment for the benefit of creditors, and because of preference is void." It is not claimed that this mortgage taken alone would constitute such an assignment, but that it and the four mortgages

4. MORTGAGES: general assignment: intention of mortgagor.

executed on the following day were one transaction, and, taken together, constitute such an assignment. In determining whether a disposition of property constitutes such a general assignment, the intention of the parties will control. *Kohn v. Clement*, 58 Iowa, 589; *Cadwell's Bank v. Crittenden*, 66 Iowa, 237. Our inquiry is as to the intention of the parties at the time of executing the mortgage to the appellee. There is some testimony as to statements made by Dryden some days after these transactions, to the effect that he had told Patterson on the twenty-fourth that he wanted to make such disposition of the firm property as that the creditors could share *pro rata*. This is denied by Patterson, and is inconsistent with what was then done; for surely Dryden knew that the mortgage would not be such a disposition of the property. We are satisfied that Dryden had no thought of giving the four mortgages executed on the twenty-fifth at the time he executed the one to the appellee. His action did not indicate any other intention than to secure the particular creditors to whom he made the mortgages. Whatever his intentions may have been on the twenty-fifth, we are satisfied that the mortgage was given to the appellee in good faith, to secure an honest debt, and as an independent transaction from the execution of the other mortgages. They were separate in point of time, and not connected by intention or circumstance. The appellee had a right to demand and receive, and Dryden to give, the mortgage in question; and we think it was given and received in good faith, and that the appellee is entitled to the benefit of it. See *Davis v. Gibson*, 24 Iowa, 257. As the proceeds arising from the mortgaged property are not in excess of the debts secured by the mortgage, the appellee was properly discharged.

The judgment of the district court is AFFIRMED.

# JOSEPHINE M. GABLE, Administratrix, Appellee, v. E. J. HAINER *et al.*, Executors, Appellants.

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1. **Witnesses**: COMPETENCY: TRANSACTIONS WITH DECEDENT. In an action based upon transactions between a father and his son, both of whom were deceased at the time of the commencement of the action, one interested as heir to the father's estate in the result of such action may be examined as a witness concerning the contents of personal communications from the father to the son, knowledge of which was acquired without personal communication with either of the deceased persons.

2. **Practice**: OBJECTIONS TO EVIDENCE NOT RULED UPON: APPEAL. Where the record upon appeal discloses no ruling upon a motion made upon the trial to strike certain evidence from the record, and no ruling was demanded by counsel, the question of the admissibility of such evidence, as raised by such motion, will not be considered by the supreme court.

*Appeal from Carroll District Court.*—HON. J. P. CONNER, Judge.

THURSDAY, OCTOBER 15, 1891.

THIS is a proceeding to establish a claim against the estate of H. J. Gable, deceased. The defendants are executors of said estate. The plaintiff is administratrix of the estate of Joseph Gable, deceased. A jury was waived, and a trial was had to the court. It was found that the defendants, as executors, were indebted to the estate, of which the plaintiff is the administratrix, in the sum of nine hundred and eighty dollars. The defendants appeal.—*Affirmed.*

*E. J. Hainer* and *F. M. Powers*, for appellants.

*Beach & Hoyt*, for appellee.

ROTHROCK, J.—The plaintiff's intestate, Joseph Gable, was a resident of Scott county, in this state, when he died, on the first day of April, 1887. The said H. J. Gable, deceased, was a son of the said Joseph Gable, and resided at Arcadia, in Carroll county, this state, where he was engaged in mercantile pursuits, such as selling goods, and buying and shipping grain. He died in October of the same year. The evidence shows, without dispute, that some time before the death of Joseph Gable his said son was indebted to him in a considerable amount. It is claimed by the plaintiff that in the spring of the year, before the death of Joseph Gable, in pursuance of some correspondence between the parties, the father sent to the son a promissory note of one thousand dollars, and an account which he held against the son, to be renewed, and the note in renewal to be returned to the father; and that the note was neither renewed nor paid when the son died. Both of the parties being dead, the principal witnesses upon whose testimony it was sought to establish the claim were the plaintiff, who is the widow of Joseph Gable, and Emma Gable, his daughter.

1. WITNESSES: competency: transactions with decedent.

The court appears to have had in mind section 3639 of the Code, which provides that "no party to any action or proceeding, nor any person interested in the event thereof, * * * shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or guardian of such deceased person." The plaintiff, being the widow, and Emma Gable, being the daughter, of Joseph Gable, and directly interested in establishing the claim, were not competent witnesses to any personal

transaction or communication between them and Henry Gable, deceased.

It is urged by counsel for appellants that said witnesses were permitted by the court, over the defendants' objections, to testify to such transactions and communications. Special complaint is made of the testimony of said Emma Gable. It appears that she was either a member of the family, or much of the time at the home, of Henry Gable. She was examined as a witness in the case more than once. At the first examination some of the testimony appears to us to be very close to the line of exclusion prescribed by the statute. But on her last examination everything appears to have been excluded except the contents of certain letters and papers sent by her father to her brother, Henry Gable. She stated positively that she acquired a knowledge of the writings without any communication with her brother. This being the testimony, it was as competent as if the communication between father and son had been by conversation with each other, and the witness a mere listener. That testimony of that kind is competent, has been repeatedly held by this court. *Sweezey v. Collins*, 40 Iowa, 542; *Dougherty v. Deeney*, 41 Iowa, 19; *Johnson v. Johnson*, 52 Iowa, 589; *Lines v. Lines*, 54 Iowa, 600. The plaintiff did not really testify to anything like a personal transaction between her and Henry Gable. Her testimony, if vulnerable to any objection, is that she related some facts which were in the nature of hearsay, being communications from her husband.

2. PRACTICE: objections to evidence not ruled upon: appeal.

The defendants moved to rule out this evidence. No ruling was made upon this motion, the court expressly reserving a ruling thereon. Whether the motion was sustained or overruled, finally, does not appear. The defendants should have demanded a ruling when the judgment was entered. We might

say, further, that we do not regard the objectionable testimony as of enough consequence to demand a reversal of the judgment.

The defendants' counsel present the usual objection that the judgment is contrary to the evidence. We have examined it, and conclude that the judgment ought to stand. AFFIRMED.

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## THE STATE OF IOWA, Appellee, v. ALBERT POSTAL, Appellant

1. **Verdict of Assault with Intent to Commit Manslaughter**: EVIDENCE. The defendant, while assisting a husband in the forcible abduction of his wife from the house of her parents, where she was residing, became engaged in a conflict with the wife's father, and in the course thereof a revolver held by the defendant in his hand was discharged, inflicting a wound in the father's knee. The defendant claimed that the revolver was discharged by accident. *Held*, that evidence was sufficient to support a verdict of an assault with intent to commit manslaughter.

2. ———: SENTENCE: REDUCTION. The youth and previous good character of a defendant in such case will not be deemed sufficient ground for reducing a sentence of six months in the penitentiary.

3. ———: INSTRUCTIONS TO THE JURY: VERDICT. The court having instructed the jury that, if the defendant "pointed the revolver at the leg of said L., and fired the same at said point in the body of L., * * * he is to be presumed to have made the assault with intent to inflict great bodily injury;" and the wound made by the defendant being in the leg, just above the knee, *held*, that the latter fact did not warrant the presumption that the defendant pointed the revolver at the leg of L., intending only to inflict the wound made, and that, therefore, the verdict of assault with intent to commit manslaughter was in conflict with the above instruction.

*Appeal from Cherokee District Court.*—HON. C. H. LEWIS, Judge.

FRIDAY, OCTOBER 16, 1891.

THE defendant was indicted for an assault to commit murder, and was convicted of an assault with intent to commit manslaughter, and sentenced to imprisonment in the penitentiary for six months. He now appeals to this court.—*Affirmed.*

*J. D. F. Smith*, for appellant.

*J. Y. Stone*, Attorney General, and *Thos. A. Cheshire*, for the State.

BECK, C. J.—I. Counsel for the defendant first insists that the verdict is without the support of the evidence, and that on this ground it ought to be reversed. We are of the contrary opinion. The evidence quite satisfactorily shows these, among other, points: One Mooney, who is sometimes designated in the abstract as "Dr. Mooney," induced defendant and two others to accompany him to Cherokee, and render him assistance in securing the custody of his wife, and in taking her with them to the house of one of the other parties. The wife was at the home of her parents, and Mooney represented that she was willing to live with him, but was prevented from doing so by her parents. The plan agreed to be followed by the parties was the forcible abduction of the wife in the night-time. It was expected she would be found at church, from whence she was to be taken in a vehicle with her husband and his friends to the house of one of the parties at some distance from Cherokee. On their way to Cherokee the party prepared themselves for their adventure by cutting bludgeons or clubs, which they took with them in the vehicle, and by drinking whiskey from a bottle which they had with them. They reached Cherokee after dark, and, finding the wife was not at the meeting where they expected to find her, they proceeded to the house of her parents, and, discovering

1. VERDICT of assault with intent to commit manslaughter: evidence.

that she was with them, Mooney and the defendant proceeded to enter, the door being opened in response to a knock for admission. Immediately a contest arose between them and the wife's parents, in which blows were given and received by each party. It is needless to inquire further into the beginning or character of the conflict. The witnesses of the parties do not agree upon the particulars. It is sufficient for our purpose to know that it was brought about by the lawless violence planned and executed by Mooney and his friends. In the conflict a revolver, which Mooney had handed to the defendant just before they entered the house was discharged, inflicting an inconsiderable wound upon the knee of Lusk, the wife's father.

The defendant claims that the revolver was discharged by accident while in his hand. His evidence on this point has no support of other witnesses or of circumstances. The fact is he had the revolver in his hand during the fight, and it was discharged while he held it. His claim that the discharge was the result of accident, or was caused by blows with a wash-board inflicted by the father upon him, some of them striking his hand, is utterly unreasonable. It will not do to excuse a pistol shot during a fight, when the weapon is in the hand of one of the parties, on the ground of accident. Men in fights with pistols in their hands usually discharge them intentionally, and not accidentally. The evidence clearly shows that the defendant was engaged in an unlawful enterprise, intending violence, and was armed with a club and a pistol, and that he fired the shot which inflicted the wound. Surely the evidence amply supports the verdict found by the jury, viz., an assault with intent to commit manslaughter, which is a crime of lower degree than the crime for which defendant was indicted. See *State v. White*, 45 Iowa, 325. If death had resulted from the shot, the crime would not have been less than

manslaughter. As the assault did not result in death, the verdict must be regarded as having sufficient support in the evidence.

II. Counsel for the defendant base an objection to the judgment on the ground that the indictment charges an assault on Lusk with intent to commit murder "by deliberately discharging a revolver loaded with powder and ball at his knee." Neither this language, nor the thought it presents, to the effect that the aim was at the knee, is found in the indictment.

III. It is said that the defendant is young, and possessed of a good character, and, therefore, the punishment is severe. We do not concur in this view. His offense is of a grave character. He entered upon an unlawful enterprise, with the intent of using violence, in preparation for which he was armed with a deadly weapon. His criminal intent clearly appears. The good of society demands that the law against violence of this kind be so enforced that it have a restraining influence upon men of all ages and conditions of life.

2. —: sentence: reduction.

IV. The district court instructed the jury that, if the defendant "pointed the revolver at the leg of said Lusk, and fired the same at said point in the body of Lusk, and did this without cause, he be presumed to have made the assault with intent to inflict great bodily injury." It is said that, as the wound was in the leg just above the knee, the presumption arises that the defendant pointed the pistol at the leg, and intended to inflict the wound upon the limb. The conclusion is, therefore, reached that the jury ought to have found that the defendant fired the pistol at the leg, and, in obedience to the instruction just quoted, ought to have found him guilty of the assault with the intent to commit great bodily injury. It is, therefore, said that the verdict is in conflict with the instruction. But it

3. —: instructions to jury: verdict.

cannot be admitted that the presumption relied upon to support this position under consideration arises in this case. There is no presumption that a man always intends to do the very thing he does do. Such a presumption would be inconsistent with the fact that men cannot always do what they attempt. Their skill, ability or their natural senses, upon which they rely to execute their purposes, may be at fault and defeat their purposes. One firing a pistol may aim at the vital parts, and hit a limb or other part of the body upon which no mortal wound would be inflicted. Surely, such a presumption as is suggested, if recognized, would render it impossible to convict for an assault with intent to commit murder, except in cases where wounds are inflicted upon parts of the body near the vital organs, or when the wound be necessarily mortal. And the same reasoning, used in support of the position under consideration, may be applied with the same force to the case where a pistol is fired and wholly misses the one assaulted. It could, with the same reason, be claimed that, as the accused missed the body and the limbs of the one at whom he shot, he intended to do so, and is, therefore, guilty of no crime. It is our conclusion that the judgment of the district court ought to be AFFIRMED.

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## J. W. WRIGHT, Appellant, v. THE E. M. DICKEY COMPANY AND THE SIBLEY LOANING COMPANY, Intervener, Appellees.

**Landlord's Lien:** CROPS: INNOCENT PURCHASER: ESTOPPEL. Where a landlord, having a lien for the rent of farm lands upon crops grown upon the premises, permitted the crops to be harvested and carried to market, and there sold to a purchaser without notice of his

lien, in reliance upon the tenant paying him the rent out of the proceeds, *held*, that the landlord was estopped from asserting any claim to the crop sold as against such purchaser.

*Appeal from Lyon District Court.*—HON. G. W. WAKEFIELD, Judge.

FRIDAY, OCTOBER 16, 1891.

THE plaintiff brought this action March 8, 1889, to recover of the defendant the value of two hundred bushels of wheat upon which the plaintiff claimed to have a landlord's lien, and which he alleges was wrongfully converted by the defendant to its own use, and that it refused to return or pay for the same, wherefore he asks judgment. The defendant denies that it converted the wheat as alleged; denies that the plaintiff had a landlord's lien thereon; and alleges that, if he ever had, the same had expired, and that he had waived his lien. The intervener alleges that it held a chattel mortgage on the wheat, and asks judgment against the defendant for the value thereof. The case was tried to the court, and a judgment entered dismissing the plaintiff's petition as against the defendant, and that the plaintiff pay forty-four dollars and sixty cents costs; also that the plaintiff's petition be dismissed as to the intervener, and that intervener recover from the defendant one hundred and eighty-five dollars and twelve cents and thirty-one dollars and sixty cents costs. The plaintiff alone appeals.—*Affirmed.*

*D. D. McCallum*, for appellant.

*J. D. F. Smith* and *O. J. Clark*, for appellees.

GIVEN, J.—I. The following facts appear without question: In the winter of 1887–88 the plaintiff agreed verbally with one S. H. Irwin to lease to him a certain seventy acres of land described, and afterwards, on

March 24, 1888, the lease was made in writing. The lease is of the seventy acres, "with all the improvements thereon, and all the privileges and appurtenances thereto belonging, for the season of 1888, for the sum of one hundred and forty dollars, payable as follows: On or before November 1, 1888." There is a further provision "that the said S. H. Irwin will keep in good repair, and do all the fall plowing in the fall of 1888." Irwin took possession, and raised a crop of wheat on the land, which he cut and stacked in the early part of August, and threshed late in September or early in October. Immediately after threshing, Irwin commenced hauling wheat to market, and sold about two hundred bushels thereof to the defendant at the town of George, receiving one hundred and eighty-one dollars and ten cents therefor; and another part thereof to Mr. Sauer, a grain buyer, from whom he also received payment. On February 15, 1888, Irwin executed a chattel mortgage to the intervener, which was filed for record the next day, and is upon "all the crops that I shall grow and raise this year on the eighty acres," describing the same lands as in the lease from the plaintiff. Immediately upon marketing the wheat Irwin fled the country without paying the plaintiff any part of the rent due except twenty dollars, and without fall plowing the seventy acres, and also without paying the intervener. The plaintiff alleges and claims that the wheat was sold by Irwin without his knowledge or consent. This is denied by the appellees, and they maintain that the plaintiff's lien, if he ever had one, had expired, and that he is estopped from asserting a lien, because of having knowingly permitted Irwin to sell the wheat as he did.

II. We first inquire as to the plaintiff's case against the defendant. The only material fact that is controverted is whether the plaintiff knew that Irwin was hauling the wheat to market and selling it at the

time he did. The plaintiff testified as follows: "I do not know what became of the wheat. I just discovered he had hauled the grain away in the morning after he left,—about nine o'clock in the morning in October;" and again: "I did not see Irwin haul away the wheat. I did not see him pass my house with any grain. I knew nothing about his hauling the grain off." Two other witnesses, who were present at the bin from which the wheat was hauled during part—and probably the greater part—of the time Irwin was hauling it, testify that they did not see the plaintiff there any of the time. Mr. Crele, general agent of the defendant, testified as follows: "In the spring of 1889, I said to Wright, 'Did you know the time Irwin harvested the wheat?' He said he did. I said: 'I should think you would have been looking after your interest there. You know he did not have anything but wheat there.' He said: 'I had all confidence in the world in him. I thought when he got the money for the wheat he would pay me.' I said: 'Didn't he pay you any part?' He said: 'No, sir. He ran away in the night.' 'Did you know he hauled this to George?' 'Yes.' 'How do you know?' 'I saw him haul it in that direction. He sold some to Rock Rapids, and some to Ashton, but most of it went in that direction.' 'Why didn't you stop him?' 'Because Ithought he would pay me as soon as he got the money.' I says, 'You had confidence in him and thought he would straighten up with you?' He said he did. I says: 'Well, if you knew he was hauling it to George, after he hauled it, why did'nt you notify our agent at George that you had a mortgage on it, and that you would hold us responsible?' He said: 'I thought the Dickey Company was good for it.'" A. N. Reed, an employe of the defendant, who was present, corroborates Mr. Crele as to what was said in this conversation. The plaintiff was not afterwards recalled, and does not deny having had such a conver-

sation. Upon this state of the testimony the district court was certainly warranted in finding that the plaintiff knew that Irwin was hauling off and marketing the wheat at the time he did. It is a familiar principle that, where one of two innocent parties must suffer for the wrongful act of another, the one who rendered the wrongful act possible must bear the burden. Concede that the plaintiff had a landlord's lien upon the wheat in full force, he would have prevented injury to himself or the defendant by asserting or making known that lien when he knew the wheat was being sold to an innocent purchaser. We are satisfied that the plaintiff's confidence in Irwin was such that he relied upon his paying the lien out of the money which he would receive for the wheat,—a confidence which was not well placed; and it is because of this misplaced confidence that one or the other of these parties must lose. It was the plaintiff who trusted Irwin, and it is he whom Irwin deceived, and he must bear the consequences of the deception as between himself and the defendant. It follows from this view that the judgment of the court dismissing the plaintiff's petition as to the defendant, and charging the plaintiff with part of the costs, and also the judgment dismissing the petition as to the intervener, must be affirmed.

It is unnecessary, therefore, that we notice in this opinion the questions discussed as to whether the plaintiff's lien had expired and whether he had waived the lien. Some questions are made upon the rulings of the court in taking testimony, but we discover no error in the rulings. As the plaintiff alone has appealed, we are not called upon to consider as to the judgment in favor of the intervener and against the defendant.

The judgment of the district court as to the plaintiff is AFFIRMED.

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# THE STATE OF IOWA, Appellant, v. JOHN MAAS, Appellee.

**Adultery**: INDICTMENT: EVIDENCE: CONSTRUCTION OF STATUTE. In a prosecution for adultery, committed by an unmarried man with a married woman, it is competent to prove that the prosecution was commenced upon the complaint of the husband of such woman, though there be no allegation of that fact in the indictment. The provision of section 4008 of the Code that such prosecution can be commenced only on the complaint of the husband or wife is not an element of the crime of adultery.

*Appeal from Johnson District Court.*—HON. S. H. FAIRALL, Judge.

FRIDAY, OCTOBER 16, 1891.

THE defendant was indicted for the crime of adultery, and upon the trial, upon the direction of the district court, a verdict of acquittal was rendered. The state appeals.—*Reversed.*

*C. S. Ranck*, County Attorney, and *M. J. Wade*, for the State.

No appearance for appellee.

BECK, C. J.—I. The indictment alleges that the defendant is not a married man, and that the crime was committed with a married woman, but it does not aver that the prosecution was commenced upon the complaint of the husband of such woman; but an indorsement thereon shows that the indictment was found at the instance of the husband of such woman with whom the crime was committed. Evidence was introduced by the state tending to show the defendant's guilt, and the state offered to prove that the husband of the woman with whom the defendant committed the crime commenced the prosecution. The evidence was

rejected, the court holding that, as there was no allegation of the fact in the indictment, it was not competent to prove it. The court directed a verdict for the defendant, on the ground that there is no averment in the prosecution to the effect that the prosecution was commenced by the husband of the woman with whom the crime was committed, and no proof of that fact was before the jury.

II. The statute (Code, sec. 4008) prescribing punishment for the crime of adultery is in this language: "Every person who commits the crime of adultery shall be punished by imprisonment in the penitentiary not more than three years, or by fine not exceeding three hundred dollars, and imprisonment in the county jail not exceeding one year; and when the crime is committed between parties only one of whom is married, both are guilty of adultery and shall be punished accordingly. No prosecution for adultery can be commenced but on the complaint of the husband or wife." This provision forbidding prosecution for the crime, except "on the complaint of the husband or wife," does not prescribe an element of the crime; it simply limits the authority of the court to punish the crime in certain cases. *State v. Donovan*, 61 Iowa, 278; *State v. Mahan*, 81 Iowa, 121. It follows that evidence as to the commencement of the prosecution by the husband or wife may be introduced, though no averment of the fact is found in the indictment. See *State v. Briggs*, 68 Iowa, 416; *State v. Brecht*, 42 N. W. Rep. (Minn.) 602; *State v. Wilson*, 22 Iowa, 364. We conclude upon these conditions that the district court erred in its rulings excluding the evidence and in directing a verdict of acquittal.

The judgment of the court below, without affecting the acquittal of the defendant under Code, section 4527, is REVERSED.

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# JOHN DULLARD, Appellant, v. MARY ANN PHELAN *et al.*, Appellees.

1. **Practice**: CONFESSION OF JUDGMENT ATTACKED FOR FRAUD: EQUITABLE RELIEF: MOTION. A confession of judgment, alleged to have been made through collusion between the parties thereto for the purpose of defeating the claims of another upon the property of the judgment debtor, cannot, upon such grounds, be attacked by a motion, filed as in the same case before approval, and praying that the judgment of confession be held to be collusive, fraudulent and void, that the same be set aside, that an execution issued thereon be recalled, and for other equitable relief.

2. **Confession of Judgment**: SUFFICIENCY OF STATEMENT. The statement, that the plaintiff having signed as security for the defendant for more than two thousand dollars, and that the defendant afterwards becoming unable to pay, the said plaintiff assumed and agreed to pay for and in behalf of the defendant a sum named, whereupon the defendant executed his certain promissory note in favor of the plaintiff, and delivered the same to him, in the sum aforesaid, and that said sum, including interest, is now justly due on said note, with said note attached thereto, properly identified, is sufficiently specific to warrant an entry of judgment by confession for the amount of said note and interest.

3. ———: ATTORNEY'S FEE. A judgment by confession is one entered without action, and such a judgment entered upon a promissory note providing for a "reasonable attorney's fee, if sued," will not authorize the taxation of an attorney's fee therein, either under said clause or the provisions of chapter 185 of Acts of the Eighteenth General Assembly.

*Appeal from Polk District Court.*—HON. W. F. CONRAD, Judge.

FRIDAY, OCTOBER 16, 1891.

THIS is a proceeding on the part of Mary Ann Phelan to have a judgment entered in favor of Dullard on the confession of Michael Phelan disapproved and vacated, and for other relief. From a judgment granting the relief demanded, Dullard appeals.—*Reversed.*

*Cole, McVey & Clark*, for appellant.

*Phillips, Day & Crosby*, for appellee, Mary Ann Phelan.

ROBINSON, J.—On the ninth day of April, 1889, a statement for a judgment by confession, made by Michael Phelan in favor of John Dullard, for the sum of twenty-three hundred and sixty-five dollars and eighty-seven cents, an attorney's fee of seventy-seven dollars and thirty cents, and costs, was filed in the office of the clerk of the district court of Polk county, and judgment was entered by the clerk on the confession. On the same day an execution was issued on the judgment directed to the sheriff of Jasper county, who received it, and levied upon notes which belonged to the execution defendant, of the par value of about thirty-one hundred dollars. On the tenth day of April, 1889, and before the judgment was approved by the court, Mary Ann Phelan, the wife of Michael, filed in the case a paper which was entitled a "motion," although in form and matter it was more in the nature of a petition. It alleged, in substance, that in the preceding month she had filed in the same court a petition for a divorce from Michael Phelan, and for the allowance of alimony, and that it was still pending; that her husband was the owner of about eight hundred acres of land in Polk and Jasper counties, upon which there were large incumbrances, and in which she is entitled to dower; that he was desirous of defeating her right of dower, and of placing the land beyond the reach of any decree or process of court, to the end that he might avoid the payment of alimony or other allowance to her, and might defraud her of her rights as his wife; that to accomplish his purposes he had colluded with Dullard for the rendition of the judgment in question, and that it was entered in fraud of her

rights; that before the judgment entry was recorded execution was issued and delivered to the sheriff of Jasper county; that unless it is recalled great and irreparable damage will result to her. The paper further alleges that the statement on which the judgment was entered was insufficient in not showing concisely the facts out of which the alleged indebtedness arose, and in not showing that the amount confessed was justly due. The relief asked is that the confession of judgment be held to be collusive, fraudulent and void, and that the same be set aside; that the said execution be at once recalled, and that no other execution or other process issue upon said judgment confession, "and for all such other further or different relief, as in equity she may be found entitled to." When the motion came on for hearing Dullard objected to the proceedings on the ground that the questions presented as to the validity of the judgment could not be determined on motion, but only by a bill in equity or by a proceeding before a jury. The objections were overruled, and a hearing was had chiefly on affidavits and the testimony of witnesses examined in open court. After the evidence had been fully submitted, the court adjudged that its approval should be withheld from the judgment; that it be set aside, and declared void and of no effect; that the sheriff of Jasper county refrain from selling property levied upon under the execution issued to him; and that he release the same and return the execution.

I. The appellant contends that Mrs. Phelan could not attack the judgment by motion. The statute authorizes the allowance of an attachment at the instance of the wife, who is suing for a divorce and alimony against the property of her husband. Code, sec. 2227. And upon a proper showing she will be entitled to an injunction to restrain the husband from dispos-

1. PRACTICE: confession of judgment attacked for fraud: equitable relief: motion.

ing of his property until the final disposition of the action. *Wharton v. Wharton*, 57 Iowa, 696. Whether the wife can also maintain an action to set aside a judgment rendered collusively and in fraud of her rights, as the one in controversy is alleged to have been, is a question we cannot determine on this appeal. The statute authorizes a judgment by confession without action. Code, sec. 2894. When a proper statement in writing, duly signed and verified, is filed, it is the duty of the clerk to enter judgment for the amount confessed and to issue execution as in other cases. Code, sec. 2897. Such judgments are to be signed by the judge, and when entered in vacation should be approved and signed at the next term. Code, secs. 176, 177; *Kendig v. Marble*, 58 Iowa, 531. The statute in regard to signing the record is directory, and a failure to sign does not vitiate the judgment. *Vanfleet v. Phillips*, 11 Iowa, 560; *Childs v. McChesney*, 20 Iowa, 434; *Traer v. Whitman*, 56 Iowa, 445.

It follows that the judgment in question was valid until set aside by the district court. Mrs. Phelan, in attacking it, not only objected to its approval, but asked that it be vacated on the ground that it was fraudulently rendered to her prejudice. To grant the relief she demanded, it was necessary for the court, in effect, to find and adjudge that she had a subsisting interest in the property specified in her motion, or a right to have it, or some portion of it, appropriated for her benefit; that the judgment would or might injuriously affect such interest or right, or some other right; and that it was rendered fraudulently or upon an insufficient showing. Such an adjudication would necessarily be final as to the rights involved, and a "judgment," within the meaning of the law. Code, sec. 2849; *Smith v. Shawhan*, 37 Iowa, 534.

Had Mrs. Phelan sought to intervene in the case before judgment was rendered, she could have done so,

if at all, only by petition. Code, secs. 2683–2685. The relief she demanded was equitable, and, if allowable, could only be granted on petition, after opportunity to the parties adversely interested to file pleadings and make defense, as in an equitable action. "A motion is a written application for an order." Code, sec. 2911. It does not ordinarily seek a final adjudication of a controverted matter. We have said that the paper filed by Mrs. Phelan was in form and matter more like a petition than it was like a motion, but that fact cannot aid her on this appeal, for the reason that the paper was treated and heard as a motion against the objections of the appellant, although the relief granted was in the form of a judgment. The appellant was denied the right of trying the case in the manner provided by law, and of that he justly complains.

II. The appellee insists that the statement on which the judgment by confession was founded was not sufficiently specific to authorize the entry of judgment. If that be true, the judgment from which this appeal is taken should be affirmed, for it was within the power of the court to disapprove the judgment on its own motion, and the fact that it did so at the request of a stranger to the record would not vitiate its action. But we think the claim of the appellee is not well founded, except as to the attorney's fee. The statement for judgment recites that Michael Phelan is justly indebted to Dullard in the sum of twenty-three hundred and sixty-five dollars and eighty-seven cents, and that the indebtedness arose as follows: "The plaintiff having signed as security for the defendant for more than two thousand dollars, and the defendant afterwards becoming unable to pay, the said Dullard, plaintiff, assumed and agreed to pay, for and in behalf of defendant, the sum of twenty-three hundred and sixty-five dollars and eighty-seven cents; whereupon the

2. CONFESSION of judgment: sufficiency of statement.

defendant executed his certain promissory note in favor of plaintiff, and delivered the same to him, in the sum of twenty-three hundred and sixty-five dollars and eighty-seven cents. * * * Affiant says the sum of twenty-three hundred and sixty-five dollars and eighty-seven cents, including interest, is now justly due on said note." The note is dated March 23, 1889, is attached to the statement, and is properly identified. We think this states concisely the facts out of which the indebtedness arose, within the meaning of section 2896 of the Code. *Kendig v. Marble*, 58 Iowa, 530; *Miller v. Clarke*, 37 Iowa, 328; *Daniels v. Claflin*, 15 Iowa, 153; *Plummer v. Douglas*, 14 Iowa, 70; *Vanfleet v. Phillips*, 11 Iowa, 559.

The agreement of Dullard to assume and pay the indebtedness for which he had been surety was on its face a sufficient consideration for the note upon which the confession was founded. It is true the creditors might elect to proceed against Phelan; and collect their claims of him; but that fact would not release Dullard from his obligation. If he failed to perform it, Phelan would have a claim against him for his failure.

But we think the allowance of an attorney's fee was unauthorized. The note provides for the payment of a "reasonable attorney's fee if sued." The statement confessed that the amount of the note was due "together with attorney's fees as provided in said note." The words "suit" and "action," as applied to legal proceedings, are synonymous terms. 2 Bouvier's Law Dictionary, tit. "Suit;" Webster's Dictionary. The filing of a statement for and the entering of judgment is not an action or suit, within the meaning of the law. A judgment by confession is one entered without action. Code, sec. 2894. Therefore, by the terms of the note, no attorney's fee was due. No doubt the clerk, in entering judgment for such a fee, supposed he was authorized to do so by

3. ——: attorney's fee.

chapter 185, Acts of the Eighteenth General Assembly. The title of the act shows that it relates to the taxation of attorney's fees in suits on written contracts in certain cases. Section 1 limits the amount of attorney's fees "in any action upon a written contract for the payment of money," made after the taking effect of the act. Section 2 provides that no fee shall be allowed, "if suit has not been commenced or expense incurred." The act does not authorize the taxation of an attorney's fee when a judgment is rendered by confession, and when, as in this case, there is no showing that expense has been incurred. The clause in the statement in relation to an attorney's fee did not vitiate the confession, for the reason that it referred to the provision in the note in regard to an attorney's fee, and according to that none was due. The clerk should have treated that part of the statement as surplusage, and entered judgment for the amount of the note and costs. If no question had been raised as to the validity of the judgment, the court should have amended it by striking therefrom the allowance of an attorney's fee, and it should then have been approved and signed. Code, secs. 177, 178. But the court evidently acted upon the claims made by the appellee, and set the entire judgment aside.

What we have said is without prejudice to any right Mrs. Phelan may have to attack the judgment against her husband in a proper manner. Whether she may do so by petition is a question not presented to us, and is not determined. The appellant insists that she cannot obtain the relief she demands by motion. The appellee has not in any manner discussed the question as to her right to attack the judgment by motion or otherwise. For the reasons indicated the judgment of the district court is REVERSED.

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# SAMUEL DALTON, Appellee, v. L. E. WEBB *et al.*, Appellants.

**Homestead:** SALE: INVESTMENT OF PROCEEDS IN ANOTHER STATE: EXEMPTION. Where the proceeds from a sale of a homestead in this state is invested in the purchase of a homestead in another state they no longer possess the homestead character, so far as the laws of this state are concerned, and in the event of a resale of such homestead in the foreign state, and the reinvestment of the proceeds in a homestead in this state the latter will be liable for debts antedating the last investment.

*Appeal from Fremont District Court.*—HON. N. W. MACY, Judge.

FRIDAY, OCTOBER 16, 1891.

ACTION to enjoin the defendants from the sale, on execution, of certain premises, on the ground that they constituted the homestead of the plaintiff. There was a decree for the plaintiff, from which the defendants appeal.—*Reversed.*

*Geo. E. Draper*, for appellants.

*H. C. Watkins*, for appellee.

GRANGER, J.—Prior to May, 1885, the plaintiff was owing the defendant Webb, which claim has since May, 1885, been placed in judgment, aggregating some five hundred and seventy-six dollars and fifteen cents. Prior to May, 1885, the plaintiff was the owner of four hundred and fifty-four acres of land in and about the town of Tabor, Iowa. In May, 1885, the plaintiff sold the entire tract to C. F. Lawrence for fifteen thousand dollars, which amount was exhausted by the payment of incumbrances on the land, and an indebtedness of the plaintiff to Lawrence. A very much disputed

question in the case, and one of grave doubt under the evidence, is whether or not it was then agreed, as a part of the consideration for the land, that the plaintiff should continue to occupy his home on the land during his life, he then being a man some sixty-nine or seventy years of age. It is a fact that he continued to reside on the land, or a part of it, for two years after the sale, when a son of C. F. Lawrence, to whom part of the land had been deeded, paid to the plaintiff twenty-five hundred dollars to vacate the premises. Of this twenty-five hundred dollars one thousand dollars were paid on an indebtedness of the plaintiffs to one Wadham, and of the remainder about seven hundred dollars were invested in what the plaintiff now claims as his homestead,—one-half being paid on the purchase price, and the other half on improvements. The remaining eight hundred dollars were by the plaintiff invested in an attempt to provide him a homestead in Nebraska, under the general homestead law, the money being used in buildings and other improvements on the land. Afterwards the homestead claim in Nebraska was sold for thirteen hundred and fifty dollars, and this amount was paid towards the present homestead of the plaintiff. The present homestead was purchased of one Goodell, the purchase price being twenty-one hundred and fifty dollars, the plaintiff assuming a mortgage thereon of eight hundred dollars. The plaintiff's statement in evidence is: "For the property I now claim as a homestead I paid Mr. Goodell about twenty-one hundred and fifty dollars. I took it subject to a mortgage of eight hundred dollars, paid three hundred and fifty dollars of the homestead money on it, and the balance was paid from money coming from Nebraska land."

For the purposes of the case we will assume that the fifteen hundred dollars the plaintiff received from Lawrence in 1887 to vacate the premises are the

proceeds of a homestead interest, without saying that such would be our finding upon a consideration of the evidence. The defendant Webb has, by an execution issued on his judgment, levied on the present homestead, and this action is to determine the liability of the homestead therefor. The district court decreed the homestead exempt. In doing so, we think it erred. No more than three hundred and fifty dollars of the purchase price of a homestead representing a value of about twenty-five hundred dollars can be said to be the proceeds of the former homestead, unless we hold that the thirteen hundred and fifty dollars for the Nebraska land were, when invested in this homestead, the proceeds of the former homestead, and to be protected as such. To so hold is to overrule the case of *Rogers v. Raisor*, 60 Iowa, 355. That case, in its purpose, is an exact parallel to this, and the principle there announced is conclusive of the question we are considering. In that case the proceeds of an Iowa homestead were taken to Missouri and invested in a homestead there. Afterwards the Missouri homestead was sold, and another homestead purchased in Iowa. It was sought to be subjected to the payment of a debt from which the former Iowa homestead was exempt. In deciding the case the following language is used: "What, then, was the character impressed on the proceeds of the Iowa homestead when taken to Missouri for reinvestment? The laws of Iowa ceased to operate upon it, and to affect its character, as soon as it was invested in real estate in the state of Missouri. It was not the proceeds of the sale of a homestead under the laws of Missouri, for those laws can apply only to a homestead held under the laws of that state. It follows that the fund arising from the sale of the Iowa homestead, upon being carried into Missouri, lost the distinctive character of being the proceeds of a sale of a homestead." The case holds that the new homestead in Iowa is not

exempt. The three hundred and fifty dollars of the proceeds of the former homestead invested in the purchase price of this could not change the rule. The homestead laws receive and are entltled to liberal interpretation, but it should only be done within the spirit of the legislative purpose. At best but eight hundred dollars of the thirteen hundred and fifty dollars from the Nebraska land were ever the proceeds of a homestead, and under the rule announced that part lost its character as homestead property, and is no longer entitled to exemption. Some importance is attached to the fact that the wife of the plaintiff did not go to Nebraska with her husband, nor consent to the use of the money there. It is true that she did not desire to go, and that the plaintiff, because of her health, did not think she should, but the record does not show that she ever had or made any objection to the investment of the money there; nor does it appear that before the investment in Nebraska there was any purpose to invest it in the Iowa homestead.

We think there should be a decree dismissing plaintiff's petition, and the cause is remanded for that purpose. REVERSED.

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# S. H. BOLING, Appellee, v. CALEB CLARK *et al.*, Appellants.

1. **Homestead**: CONVEYANCE BY HUSBAND: ADVERSE POSSESSION: QUIETING TITLE. Ten years of continuous, open, notorious and adverse possession of real estate under a claim of right based upon a contract for a deed to a part of a homestead, executed by the husband alone, is sufficient to entitle the holder to maintain an action to quiet his title as against the homestead interests of the wife

2. ———: ———: ———: DOWER. But the wife's inchoate right of dower in such property is not in any manner affected by adverse possession.

*Appeal from Madison District Court.*—HON. J. H. HENDERSON, Judge.

FRIDAY, OCTOBER 16, 1891.

THIS is an action in equity to quiet the title in the plaintiff to five acres of land. There was a decree for the plaintiff, and the defendant Ruth Clark appeals. *Modified and affirmed.*

*John Leonard & Son*, for appellants.

*Dabney & Guiher*, for appellee.

ROTHROCK, J.—I. The cause was submitted to the court upon an agreed statement of facts, which are in substance as follows: The defendants were married in 1851, and have since that time lived together as husband and wife. At about 1855 they took up their residence upon a tract of land consisting of twenty-five acres. The title was taken in the name of said Caleb Clark, and the said land or part thereof is still used and occupied by them as a homestead. They have all these years lived in the same house and in the same place on the land. Afterwards they sold and conveyed twelve acres off the north end of said tract. They are now in the possession of eight acres of the land, and the controversy in this action is whether the homestead right and inchoate dower right of the wife still remains in the five acres not now in their possession. The facts as to the five acres are that, in the year 1856 or thereabouts, the said Caleb Clark sold and entered into a contract to convey said five-acre tract to one Philbrick for the sum of one hundred and twenty-five dollars,

2. HOMESTEAD: conveyance by husband: adverse possession: quieting title.

one-half of which sum was paid. The other half of the consideration was not paid, and no deed of conveyance was ever made by Clark to Philbrick. In the year 1856, Philbrick conveyed the land by deed to one Rhodes. On the twenty-fifth day of June, 1869, Rhodes conveyed the land by deed to one Munger. In the year 1872, Munger, under claim of right, took actual possession of said five acres. In 1873, Munger conveyed the land to M. E. Bedford, and in 1889 Bedford conveyed to the plaintiff.

The plaintiff and his grantors have paid the taxes on the land in controversy since the year 1865, and they have been in the actual possession thereof under claim of right since the year 1872. This action was commenced on the twenty-seventh day of November, 1889. The said Caleb Clark made no defense to the action. Ruth Clark answered, setting up her homestead and inchoate right to dower in the land. The homestead right is based upon the claim that she has never been divested of said right by a conveyance which she and her husband concurred in and signed the same joint instrument as required by section 1990 of the Code. The plaintiff claims that, as he, and those under whom he claims, have been in the continuous, open, notorious and adverse possession of said land under claim of right since the year 1872, such possession has ripened into a perfect title, which he can assert and maintain against all the world. We have held that such a title creates not only a defensive right, but that it is an affirmative right, which may be asserted and maintained in an action to quiet title. *Cramer v. Clow*, 81 Iowa, 255. Some question is made by counsel for the appellant as to whether the possession of the plaintiff and his grantors was adverse. We think this is conceded by the agreed statement of facts and the pleadings in the case. The possession was exclusive, open and notorious and continuous under claim of right, and the

claim of right can have reference to no other claim than that founded upon the deeds of conveyance of the several parties. When the possession was taken by Munger, and at any time thereafter for the period of ten years, as fixed by section 2529 of the Code, the defendant Ruth Clark could have maintained an action to recover the possession of the five acres in controversy. Under the statutes of this state, the fact that she was a married woman did not preclude her from maintaining such an action. If we were to so hold, it would be within the power of the husband to practically deprive the wife of the occupancy of at least part of the homestead. In *Adams v. Beale*, 19 Iowa, 61, it is said: "The right of the wife to the homestead of the husband and her interest in it are permanent, fixed and substantial. They are not merely possible, remote or contingent. Her rights and interests are in possession and enjoyment, and not merely in expectancy or dependent." She has the undoubted right to maintain an action to preserve her homestead, or any part thereof. Having this right, is there any good reason why she should not commence her action within the ten years fixed by the statute? We can discover none. And she has no more right to interpose a defense against a title by adverse possession than she has to maintain an action. There is nothing in all the law we have upon homesteads which in any sense limits the operation of the statute of limitations.

II. The decree quieted the title in the plaintiff, and no mention is made therein of the inchoate or prospective right of dower of Ruth Clark in the land. As she has never joined in any conveyance, and her right to assert dower depends upon her surviving her husband, and is not in any manner affected by adverse possession, the decree should have excepted her inchoate right of dower from its operation. Counsel for the appellee do not argue

2. —: —: —: dower.

this question, and we assume that they concede that the decree should be modified in this respect, and it will be so modified. MODIFIED AND AFFIRMED.

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DANIEL McCARTHY, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

**Master and Servant:** NEGLIGENCE: PERSONAL INJURY: EVIDENCE: VERDICT. The plaintiff was a bridge builder in the employ of the defendant, and at the time of receiving his injuries was engaged in assisting in the removal of a heavy timber, known as a chord, from a truss bridge to the ground by the aid of a pile driver and flat car. As the chord was raised from the bridge, the north end resting on the flat car, while the south end extended beyond the rear of the car, and several feet higher than the north end, it swung against the leads of the pile driver, and became fast. While attempting to shove the chord from the frame the plaintiff's leg was struck by the chord, and broken. Upon the trial the plaintiff testified, that the exhaust of the engine was running at this time, and that when running "everything worked by signs;" that he was standing at the south end of the car to keep out of the way of the chord until he got orders, when the foreman motioned to him, and shook his head at him as if he were standing there too long, but he could not hear what he said; that the foreman motioned to him to go across there (the witness illustrating with a forward movement with the hands), and that he went over and took hold of the chord, when there was a slack on the leads, and he was struck by the chord; that when the foreman made said signal to the plaintiff he was standing between the men holding the leads and the car on the track. The plaintiff further testified, "I did not know what he (the foreman) motioned at me for, but I went ahead there." The jury found specially that the foreman ordered the plaintiff by motion and gesture to go over to the east side of the car, and push the end of the chord resting on the car off onto the ground, and returned a general verdict in favor of the plaintiff. *Held*, that the special findings were not supported by the evidence, and that under the allegations of the petition charging the defendant with negligence in that the foreman directed the above action of the defendant by motions and gestures, the evidence did not warrant the conclusion of negligence against the company in ordering the plaintiff to the place where he was injured.

*Appeal from Cass District Court.*—Hon. H. E. Deemer, Judge.

Saturday, October 17, 1891.

Action for personal injuries. There was a verdict and judgment for the plaintiff, from which the defendant appeals.—*Reversed.*

*T. S. Wright*, *Cummins & Wright* and *R. G. Phelps*, for appellant.

*James J. Dolan* and *Willard & Willard*, for appellee.

Granger, J.—The plaintiff was a bridge builder and employe of the defendant company. In August, 1887, he was engaged in his capacity as bridge builder, on and about a pile driver used by the defendant company in the construction and repair of railway bridges. The pile driver for use was placed on a flat car, and by that means moved as the necessities for its use required. The pile driver was operated by a stationary engine on the same car. The plaintiff's duties were "to work upon the bridges; assist in putting on and taking off such timbers as were used on the cars, as they were being hauled from place to place on the car; and to work on and about the car when in motion, and when standing still; to assist in attending to the pile driver and the brake on the car, which had to be tightened and loosened as the car was moved or stopped." About the twenty-eighth day of August, 1887, the car and pile driver were being used in the repair of a bridge on the defendant's road, and the car with the pile driver having been placed in proper position on the track by a locomotive engine, the pile driver and stationary engine were used to raise, from a truss bridge which was being moved, a heavy timber known

as a "chord," and to lower it to the ground; the chord, when loosened from the bridge, being pendent from the pile driver by a "pile-line." As an aid or means of governing its course, there was attached to it a hand-line, by which others than the plaintiff aided in the work. The foreman of the work was one Elgenfritz. As the chord was raised from the bridge, the north end rested on the floor of the car, while the south end extended beyond the rear of the car, and was several feet higher than the north end. In this position it swung against the leads of the pile driver, and, it is said, catching a bolt, became fast. The men with the hand-line thus held the chord against the leads, and the car was moved forward to the place where the chord was to be lowered to the ground. At this time the chord was on the east, and the plaintiff on the west, side of the car. The plaintiff went to the east side, and, in an attempt to shove the chord from the frame, his leg was struck by the chord, and broken. This injury is charged as the neglect of the defendant in the following language; "That, notwithstanding the dangerous position of said chord, * * * said foreman carelessly and negligently directed, by motions and gestures, plaintiff to pass over from the west side of the car to the east side, and to push the end of the chord resting on the car off onto the ground, which direction plaintiff immediately undertook to perform, and passed over to the east side of said car, and took hold of said chord, and attempted to push the same off the car; that at or about the same time said foreman, knowing, or in duty bound to know, that plaintiff was near the north end of said chord, and in a place of danger should said chord be loosened, carelessly and negligently ordered the men holding the hand-line to swing with the same to the east and to pull; that said men, in obedience to said order, carelessly and negligently passed forward, and to the east, with said hand-

line, * * * and there carelessly and negligently pulled said chord loose."

The jury returned fourteen special findings, among which are the following, as to the negligent acts of Elgenfritz: "*Ninth.* Do you find that Elgenfritz gave an order, by motion and gesture, to plaintiff, to pass over from the west side of the car to the east side, and to push the end of the chord resting on the car off onto the ground? *A.* Yes.

"*Tenth.* Do you find that Elgenfritz gave an order intentionally to plaintiff, by motions and gestures, to pass over from the west side of the car to the east side, and to push the end of the chord resting on the car off on the ground? *A.* Yes.

"*Eleventh.* Do you find that Elgenfritz intentionally gave to the plaintiff an order, by motion and gesture, to go from the west side of the car to the east side, and push the end of the chord resting on the car off onto the ground, by standing or stepping in front of the end of the stick or chord? *A.* Yes."

It is urged that these findings and the verdict have no support in the evidence, and we think the position is correctly taken. The following from the plaintiff is the testimony, as quoted by appellee, for their support: "Mr. Elgenfritz stood between me and those men [the men who held the hand-line], and, the engine being exhaust, used to work by signs; and he motioned me to go across there [here witness illustrates with a forward movement with his hands]; and I stood right here at the end of the car. I went over and took hold of the stick of timber, caught hold of it, and then there was a slack, and shoved me right against there." "When Elgenfritz made this signal to me, he stood between the men and the car on the track. There was nothing to prevent his seeing me. When I was standing there, on the west side of the leads, Elgenfritz had just turned around, and made a motion at me, and shook his head

at me. He is a quick man in making motions, and he gets excited, and he swore, and said something, I could not say what, but he motioned at me to move over. I was standing west of the leads, at the south end of the car, close to the leads, with my hands on the leads or the rod that stood behind them. I was standing there to keep out of the way of the chord until I got orders. Elgenfritz motioned at me and shook his head, as if he said something. I could not say what he said. I understand he was swearing. He motioned, and shook his head, as if I was standing there too long. He said something, but I could not catch it. I could hear his voice, but if I am not mistaken the exhaust of the engine was running at the time; and when it was running, everything went by motions. I went over to the north end [of the car], because the motion gave me orders to shove it off from the frame. It was kind of caught, I suppose. It stood up there, and he motioned for me to go over. I did not know what he motioned at me for, but I went ahead there. I was always ready to do what I was ordered to do."

Nothing that we find in the evidence adds to the foregoing to show that the foreman ordered the plaintiff to the place where he was injured. Although the plaintiff says that he was by the motions ordered to go where he did to shove off the chord, it is manifest from his statements that he only supposed the foreman so intended. He also says, in terms, that he did not know what the foreman motioned at him for. The most that can be said, from the evidence, is that the foreman made motions that he did not understand; and, upon his judgment of what was meant, he went to the place where he was injured. The findings of such fact cannot warrant the conclusion of negligence against the company in ordering him to the place where he was injured. Under the allegations, he must have been ordered to the place; not motions made, from which

he merely understood such an order, for no such negligence is charged, and the specific acts of negligence relied upon are alleged. Elgenfritz testifies that he made no motions whatever to the plaintiff, and did not see him, and the other persons observing the situation saw no such motions; all of which strengthens the appellant's view of the case. But, as to matters of conflict, we adhere to the rule that they must be considered in support of the verdict, and we base our conclusions on the fact of the absence of evidence from which the jury could properly find that such an order was made. A motion designed for one purpose, and misunderstood, mistakenly, for another, would not be an order for the latterpurpose.

It is urged that it was negligence for Elgenfritz to order the men with the hand-line to pull the chord loose from the leads while the plaintiff was at the north end of it, even though he did not order him there. But evidence is equally wanting to support a conclusion that Elgenfritz knew that the plaintiff was there. His (Elgenfritz) testimony is, that he did not know that he was there when such order was given, and there is no testimony to show that he did. The plaintiff testifies that Elgenfritz motioned to him while he was on the west side of the car; but, as we hold, there is no evidence from which it could be found that he ordered him to the place of injury. It cannot be said from the fact of the motions being made, that he was seen by Elgenfritz at that place. No additional evidence is cited by the appellee to sustain this point, and we discover none.

It is, however, urged that it was Elgenfritz's "business to know" if any person was in the way of the moving timber, and counsel cites the rule as to persons shoveling ice and snow from the top of a building to a sidewalk. We think that, before the case can be likened to that of shoveling ice or snow upon a side-

walk, it should appear that there were similar reasons for anticipating the presence of persons at the place of danger. We are not disposed, in any degree, to weaken the rule of diligence designed in the interest of personal safety, but we think the statement of the rule, that he was bound to know of the plaintiff's presence, is too broad, and without the support of authority. That he was required to be diligent to know we may, for the purposes of the case, concede, but we look in vain for testimony to give support to a conclusion of negligence in this respect. In fact, the case is without evidence to support a conclusion of negligence, under the allegations of the petition. In support of our legal conclusion, see *Bothwell v. C., M. & St. P. Ry. Co.*, 59 Iowa, 192; *Moore v. Burlington & W. Ry. Co.*, 72 Iowa, 75; *Asbach v. Chicago, B. & Q. Ry. Co.*, 74 Iowa, 248; *Lester v. Sallack*, 31 Iowa, 477; *McKay v. Thorington*, 15 Iowa, 28; *Lodge v. Reznor*, 13 Iowa, 600.

We discover no other question that, in view of the further disposition of the case, demands our consideration, and the judgment is REVERSED.

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# GERMAN BANK, Appellee, v. AMERICAN FIRE INSURANCE COMPANY, Appellant.

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115 714
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1. **Attachment:** GARNISHMENT OF NON-RESIDENT DEBTOR: GARNISHEE SUED IN ANOTHER STATE: ABATEMENT. A., a corporation organized under the laws of Pennsylvania, and doing business under a license in the state of Illinois, and also in this state, being indebted to D., a corporation organized under the laws of this state, the latter assigned its claim against A. to G., a resident of this state, and gave notice thereof to A. Afterwards the firm of G. & W., creditors of D., commenced an action against D., aided by attachment, in the state of Illinois, and garnished A. The latter answered as to the assignment to G., and thereupon G., being served with notice to interplead, appeared and

answered in the case in Illinois, submitting itself and its interests in the debt garnished to the jurisdiction of that court. Subsequently, and while the action in Illinois was still pending, G. commenced an action upon the assigned claim against A. in this state. *Held*, upon demurrer to an answer by A. therein, in the nature of a plea in abatement, that the laws of Illinois being presumed to be the same as those of this state, in the absence of a showing to the contrary, A. was liable to suit upon the claim of D. in the courts of Illinois, in all respects as a resident corporation of that state would be, and likewise to garnishment therefor, and, therefore, the Illinois court, by its process of garnishment, and the appearance of G. therein, had acquired jurisdiction of the claim in controversy.

2. **Process**: EXTRA-TERRITORIAL SERVICE: VOLUNTARY APPEARANCE: WAIVER OF JURISDICTION. The Illinois court being without jurisdiction to require G. to interplead in the garnishment proceeding, its appearance in response to the process of that court is to be regarded as voluntary, and a waiver of its right to object to the jurisdiction of the court.

*Appeal from Dubuque District Court.*

SATURDAY, OCTOBER 17, 1891.

ACTION on a policy of insurance. The answer of the defendant was in the nature of a plea in abatement. A demurrer thereto was sustained, and, the defendant refusing to further plead, judgment was rendered in favor of the plaintiff for the amount of its claim. The defendant appeals.—*Reversed.*

*Myron H. Beach*, for appellant.

*McCeney & O'Donnell*, for appellee.

ROBINSON, J.—The facts admitted by the pleadings are substantially as follows: The defendant insured the Dubuque Mattress Company on certain property against loss by fire to the amount of five hundred dollars. On the first day of April, 1889, and during the life of the policy, the property insured was destroyed by fire, and the defendant thereby became liable on its

policy for its full amount. On the next day the assured assigned to the plaintiff its claim against the defendant for the loss, and the latter was notified of the loss and the assignment. At the time in question the plaintiff and the mattress company were Iowa corporations, engaged in business at Dubuque, and the defendant was a corporation organized under the laws of the state of Pennsylvania, having its general agency at Philadelphia, and doing an insurance business in Dubuque, and also in Illinois under a license issued by that state. On the tenth day of April, 1889, the firm of Glover & Willcombe, doing business in Chicago, commenced an action in the superior court of Cook county against the Dubuque Mattress Company. The action was aided by attachment, and the defendant was served with a notice of garnishment as a debtor of the mattress company, and made answer under oath, as required by the laws of Illinois. In its answer it stated the facts in regard to the insurance and loss, and the assignment to the plaintiff. Glover & Willcombe thereupon made application to the court, under the laws of Illinois, for an order requiring the plaintiff to interplead, which was granted and served. The plaintiff then appeared in the action, and, as the answer in this case alleges, "submitted itself, and its rights, claims, interests and property in and to the subject-matter of this action, to the jurisdiction of said superior court, and made and filed therein its plea and interpleader, setting forth its rights to and ownership of and interests in said subject-matter by virtue of the assignment thereof aforesaid." The plaintiffs in that action denied the allegations contained in the answers of the garnishee and the bank, and the issues thus formed stood for trial in the superior court of Cook county when this action was commenced. That court had competent original jurisdiction, and the proceedings therein had were authorized by the statutes of the state of Illinois.

I. The ground of the demurrer is, in substance, that the facts set out in the answer fail to show that the Illinois court has jurisdiction of the defendant, or of the subject-matter of this action. The theory upon which the demurrer was sustained appears to be that the defendant and the Dubuque Mattress Company were, as to Illinois, foreign corporations; and as the defendant is not shown to have had the money in controversy in its possession in that state, and as the transaction out of which the indebtedness arose was not in any way connected with any office or agency of the defendant, jurisdiction was not acquired by the proceedings therein had. There are authorities which hold that process of garnishment served upon a non-resident of the state in which the action is pending, who is but temporarily within that state, is not effectual as an attachment; and the reason given for such holding is that property not in the state, in the hands of non-residents, and debts due from them, are not within the jurisdiction of the court, and, therefore, cannot be acted upon by it. *Wright v. Chicago, B. & Q. Ry. Co.*, 27 N. W. Rep. (Neb.) 90. "Mere choses in action are considered with reference to the trustee process as local, and not as following the person of the trustee wherever he may transiently be found." *Sawyer v. Thompson*, 24 N. H. 514. In that case it was held that, if all the parties are inhabitants of another state, the garnishee cannot be charged where suit is brought, unless he has goods in his hands belonging to his principal, or has contracted to pay him money or deliver him goods in the state where the action is brought and the process of garnishment is served; and, in the absence of statutory enactment to the contrary, that is, perhaps, the general rule, especially when the defendant is not personally served within the state. *Lawrence v. Smith*, 45 N. H. 539;

1. ATTACHMENT: garnishment of non-resident debtor: garnishee sued in another state: abatement.

*Green v. Bank*, 25 Conn. 452; *Gold v. Housatonic Ry. Co.*, 1 Gray, 425; *Tingley v. Bateman*, 10 Mass. 343.

But we do not think the authorities cited are applicable to this case. The pleadings do not show what the laws of Illinois are, excepting as we have stated, and, in the absence of a showing to the contrary, we must presume that they are the same as the laws of this state. The defendant, when garnished, was doing an insurance business under a license duly issued. In order to transact such business, it was necessary for it to appoint an agent in that state on whom process might be served with the same effect as though it had been served upon the company. Code, sec. 1144; *Niagara Ins. Co. v. Rodecker*, 47 Iowa, 165.

The fact that it had been licensed, and was doing an insurance business in the state, authorizes the presumption that it had in all respects complied with the requirements of its laws. *Ex parte Schollenberger*, 96 U. S. 369. By so doing, it became subject to those laws, and to treatment in many respects as a domestic corporation, and liable to be sued in all respects as such a corporation would be. *McNichol v. Mercantile Rep. Agency*, 74 Mo. 472; *Railway Co. v. Harris*, 12 Wall. 65. An action aided by attachment may be brought in any county of the state, wherever any part of the property sought to be attached may be found, when the defendant whose property is thus pursued is a non-resident of the state. Code, sec. 2580. The record does not show what agency the defendant had in Illinois; but whether it had its principal place of business for the state in Cook county, or whether it was found there in the person of an agent, is immaterial, for the purposes of this case. No question is made as to the agent upon whom service was made, nor as to the county in which the action was brought, and the provisions of law were ample for commencing action against the defendant and enforcing its liability in

Illinois. Code, secs. 1144, 2584, 2586. Proceedings by garnishment are, in effect, a suit by the defendant in the name of the plaintiff against the garnishee. Drake on Attachment, sec. 452; *Daniels v. Clark*, 38 Iowa, 559. Had the mattress company, before assigning its claim, brought suit against the defendant in Illinois, it cannot be doubted that it could have recovered, and any creditor of the mattress company could have appropriated the debt by means of an action against that company aided by attachment. Therefore, assuming that the defendant owed the mattress company when Glover & Willcombe commenced their action, it was authorized. The case of *Mooney v. Illinois Cent. Ry. Co.*, 60 Iowa, 347, as to the right of garnishment, is much like this in principle, and supports the conclusion we have reached. See, also, *Hannibal & St. J. Ry. Co. v. Crane*, 102 Ill. 249; *Morgan v. Neville*, 74 Pa. St. 56; *Barr v. King*, 96 Pa. St. 487; *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 216.

It must be understood that what we have said applies to the attachment by garnishment of debts, and not to other personal property, as merchandise, which has a corporeal existence and an actual location. The rule in regard to such property was considered in *Montrose Pickle Co. v. Dodson & Hills Mfg. Co.*, 76 Iowa, 172. It is our opinion that the pleadings show that the superior court of Cook county acquired jurisdiction of the claim in controversy by its process of garnishment, and the service of notice of the proceedings on the bank, the plaintiff in this action.

II. A further objection to the right of the plaintiff to maintain this action is that it submitted itself to the jurisdiction of the superior court of Cook county by appearing therein, and joining issue on the merits of the controversy. If that court was not authorized to make the order requiring the bank to interplead, the action

2. PROCESS: extra territorial service: voluntary appearance: waiver of jurisdiction.

of the latter in appearing must be regarded as voluntary, and as a waiver of its right to object to the jurisdiction of the court. *Young v. Ross*, 31 N. H. 205. REVERSED.

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# HENRY PELLIZZARRO, Appellant, v. ELIZABETH REPPERT *et al.*, Appellees.

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J101 357
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107 609
83 497
111 483
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d115 808
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j118 272
118 273
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121 58
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1. **Wills**: ELECTION BY WIDOW: EVIDENCE OF. Where a widow conveyed to her daughter, in consideration of love and affection and of an agreement for future support, all of the property, both real and personal, devised and bequeathed to her by the will of her husband, save certain promissory notes specially excepted therefrom, and the executor, in accordance with said deed, turned over to said grantee all of the personal property not sold, *held*, that said conveyance was sufficient evidence of the consent of the widow to take under the will.

2. ———: CONSTRUCTION: INTENTION OF TESTATOR: LIFE-ESTATE WITH POWER OF DISPOSITION. The devise to the wife was of "all my property, real, personal and mixed, absolutely, for her use and benefit during her life, to be used and disposed of in such manner as she sees fit; and, at her death if there remains any of said property," the same to go to the children. Afterwards the husband executed a codicil reciting therein that, having in his last will given and bequeathed all his real estate unto his wife, he thereby modified said bequest by giving her a life-estate only in certain lots described, and the remainder after her death to certain of his grandchildren. *Held*, that the widow took an estate in fee in all of the real estate except the lots described in the codicil, and in the latter an estate for life.

3. **Conveyance of Real Estate**: CONSIDERATION: AGREEMENT FOR FUTURE SUPPORT. At the time of the above conveyance by the widow she was sixty-five years of age, and the same was made in consideration of an agreement for support and maintenance during her life, including board, clothing and all other things necessary for her comfort and happiness, which was secured by bond. It was then uncertain how long the widow would live, and the daughter was the only one of her children residing near her. *Held*, that the consideration was sufficient.

*Appeal from Des Moines District Court.*—HON. CHARLES H. PHELPS, Judge.

SATURDAY, OCTOBER 17, 1891.

ACTION for the partition of Pellizzarro's subdivision of part of section 29, township 70 north, of range 2 west, Des Moines county, Iowa, consisting of thirty-one lots, numbered from one to thirty-one. There was a decree dismissing the plaintiff's petition, and quieting the title in the defendants. The plaintiff appeals. The issues and facts appear in the opinion. *Affirmed.*

*Le Monte Cowles* and *S. L. Glasgow*, for appellant.

*Power & Huston*, for appellees.

GIVEN, J.—I. On November 2, 1870, Peter Pellizzarro executed his last will, providing as follows:

"Subject to the payment of all my just debts and funeral expenses, I will and bequeath unto my beloved wife, Martha Elizabeth, all my property, real, personal and mixed, absolutely, for her use and benefit during her life, to be used and disposed of in such manner as she sees fit; and at her death, if there remains any of said property, I will and direct that the same shall go, share and share alike, to my children then living, or to the children of any one of my children who may have previously died; that is to say, the children of any of my children shall take and have only the share which would have been their parent's, if living. But, in this bequest to my children and their heirs I do not include my son Jacob and his heirs, who reside in Italy; he, the said Jacob, having already received his share of my estate, except five dollars, which I hereby bequeath to him in full of all claims upon my estate. My children now living are Elizabeth Reppert, Mary Bersch, Henry and Jacob."

On November 8, 1873, he executed a codicil as follows: "Having in my last will, of date November 2, 1870, given and bequeathed unto my wife, Martha Elizabeth Pellizzarro, all my real estate, I hereby modify said bequest as follows: In regard to lots numbers 18, 16, 20, 21, 35 and 23, in Pellizzarro's subdivision of a part of section 29, township 70 north, of range 2 west, my said wife is to have said lots named during the time of her natural life, and after her death I give and bequeath said lot number 18 to my grandson Wm. F. Reppert; said lot number 20 to my granddaughter Adrienne Reppert; lot number 21 to my granddaughter Liana Reppert; lot number 25 to my grandson Edward Reppert; lot number 23 to my grandson Phillip Reppert,—to have and to hold, to each of them respectively their heirs and assigns, forever after the death of my said wife."

Peter Pellizzarro died May 16, 1874, seized of all of said real estate, and leaving Martha Elizabeth, his widow, and four children surviving him. The will and codicil were duly proven September 8, 1874, and administration granted upon them. The widow continued to reside upon the property, and on September 22, 1874, in consideration of future support, secured by bond, and of love and affection, conveyed all of the lots except those described in the codicil, and all the personal property that came to her, except two promissory notes, to her daughter Elizabeth Reppert. Mrs. Pellizzarro continued to reside with, and was supported by, Mrs. Reppert and her husband, on the property until her death, February 19, 1878.

II. The appellant's first contention is that, as Martha E. Pellizzarro did not enter consent of record to take under the will, she must be held as taking one-third in fee, as provided by law. Code, sec. 2452. "The widow's share cannot be affected by any will of her husband, unless she consents

1. WILLS: election by widow: evidence of.

thereto within six months after notice to her of the provisions of the will by the other parties interested in the estate, which consent shall be entered on the proper records of the circuit [district] court." Consent to take under the will may be shown otherwise than by the record. *Stoddard v. Cutcompt*, 41 Iowa, 329; *Ashlock v. Ashlock*, 52 Iowa, 319; *Craig v. Conover*, 80 Iowa, 355. In the latter case it is said: "If the record discloses an act or declaration of the widow plainly indicating a purpose to take under the will, she will be held to have so elected." The report of the executor showed that he had turned over all the personal property not sold to Mrs. Reppert, she having purchased it of the widow, to whom it was bequeathed, and refers to the deed of September 22, 1874, as recorded. By deed to Mrs. Reppert, the widow evidenced her consent to take under the will and by the record of the report that act is shown on the record. We think the consent sufficiently appears.

III. The devise to Mrs. Pellizzarro is of "all my property, real, personal and mixed, absolutely, for her use and benefit during her life, to be used and disposed of in such manner as she sees fit; and at her death, if there remains any of said property," to the children. The appellant contends that under this provision Mrs. Pellizzarro took but a life-estate in the real property. It is the rule that a devise of property in general terms, with power of disposal, creates an estate in fee, and any limitation over is void for repugnancy. *Halliday v. Stickler*, 78 Iowa, 388, and cases cited. By this devise an estate in fee is created, then, clearly, the provision as to the children is void for repugnancy. If we omit the words "during her life," the devise is unquestionably in general terms, and with power of disposal. It is to Mrs. Pellizzarro absolutely, to be used or disposed of in such manner as she sees fit. The contention

2. ——: construction: intention of testator: life-estate with power of disposition.

is as to the effect to be given to the words, "during her life," in arriving at the intention of the testator. Cases are cited showing the construction given to wills involving the nature of the estate devised. Such cases are numerous, but, as said in *Benkert v. Jacoby*, 36 Iowa, 273, "Cases on wills may guide us to general rules of construction, but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills." None of the cases cited are directly in point, nor do they agree in every circumstance with this. In construing wills, we are to discover the intention of the testator, and to do so must look to the entire instrument. *Hopkins v. Grimes*, 14 Iowa, 73. This testator has left no room for doubt as to the estate he intended his widow should have. Any doubts that might have arisen upon the devise, as first made in the will, are set at rest by the codicil. The testator must have believed that his will expressed his intention; otherwise he would have revoked it. By the codicil he shows his own interpretation of it. Having devised, as he had, in the will, he afterwards concluded to make a different disposition of certain of the lots. He decided to give his wife but a life-estate therein, with remainder to his grandchildren. If he understood and intended by the first devise to give his wife only a life-estate, then it was only necessary to provide as to the remainder in these lots. In the codicil he recites that he had given and bequeathed unto his wife all his real estate, and then says: "I hereby modify said bequest as follows," and modified it by providing as to certain of the lots that "my said wife is to have said lots above named during the time of her natural life, and after her death" to his grandchildren named. The modification is in two respects. The first limits the devise in these lots to his wife to a life-estate,

and the second devises the remainder to the grandchildren named. We must presume that the testator believed that his will correctly expressed his intention, and that he acted on that belief in making these modications. If he intended by the will that his wife should only have a life-estate in his real property, then no modification was necessary, except to provide as to the remainder. The recital and provisions of this codicil are against the conclusion that the testator intended by his will to limit his wife to a life-estate. If we were left to the will alone, we would hesitate before holding that it devised but a life-estate, but aided, as we are, by the codicil, we are in no doubt but that the first intention was to give the widow an estate in fee in all the real estate, and that the modification limiting her estate to one for life only applies to the lots described in the codicil.

IV. The conveyance from Mrs. Pellizzarro to Elizabeth Reppert is attacked upon the ground of want of consideration and incapacity of Mrs. Pellizzarro to contract. The consideration was an agreement for support and maintenance to Mrs. Pellizzarro during her life, including board, clothing and all other things necessary for her comfort and happiness, secured by bond. Mrs. Pellizzarro was then sixty-five years of age, and subject to infirmities incident to her years. Of her three children Mrs. Reppert was the only one residing near, and giving her attention. Mrs. Bersch resided at St. Louis, and was only an occasional visitor, and the plaintiff was in the West, where he had been for many years, giving no care or attention whatever to his parents. Mrs. Pellizzarro was alone, with no one to look to but Mrs. Reppert and her husband, who had left their own home, and gone to hers to care for her when left alone by the death of her husband. When this agreement was made, and bond and deed executed,

8. CONVEYANCE of real estate: consideration: agreement for future support.

it was uncertain how long and to what extent care and support might be required. It may be true, as argued, that the value of the property largely overpaid for the support furnished, but this could not be known in advance. There was a good and sufficient consideration for this conveyance aside from the consideration of love and affection named in the deed. As to the capacity of Mrs. Pellizzarro to make this contract the testimony is conflicting. A careful examination of it shows that most of that which the plaintiff relies upon as showing incapacity are simply acts peculiar to one of her years. There is nothing to convince that she was not capable of making this contract, and that it was not made honestly and understandingly, and free from any undue influence.

These views lead to the conclusion that the decree of the district court should be affirmed. It is unnecessary, therefore, that we notice defendants' plea of the statute of limitations. AFFIRMED.

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JOHN LOFTUS, Appellee, v. J. E. RILEY & Co., Appellants.

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100 302

1. **Sales**: FUTURE DELIVERY: AGREEMENT AS TO QUALITY: PERFORMANCE: EVIDENCE. A contract for the sale and future delivery of granite blocks for paving the streets of a city contained certain specifications designating the quality and dimensions of the blocks to be used by the paving contractor, and providing that in no case would the contractor be allowed to use blocks other than those described in the specifications, or which should be approved by the city engineer. Some of the blocks shipped by the plaintiff to the defendants under said contract having been objected to by the city officials, the defendants refused to receive any of the blocks shipped. *Held*, in an action by the vendor against the vendee for the breach of said contract, that the plaintiff was properly permitted to show that the blocks furnished by him were as good as those laid by the defendants, and accepted by the city.

2. ———: ———: ———: ———: USAGE: INSTRUCTIONS TO JURY. It appearing that the usage in such cases is, that the vendees were required to accept the blocks which were equal to the requirements of the contract, if the plaintiff stood ready to make good the defective ones and that the plaintiff was able and ready so to do, *held*, that the court properly refused to instruct the jury that the plaintiff was not entitled to recover if a considerable number of the blocks tendered by the plaintiff did not meet the requirements of the contract.

3. ———: ———: REFUSAL OF VENDEE TO ACCEPT: REMEDY OF VENDOR: TENDER. The defendants having, by their contract, placed it out of their power to accept the blocks contracted for, *held*, that the plaintiff was justified in relying upon their action as a waiver of a tender of the balance of the contract number of blocks not shipped, and was entitled to recover damages for that portion of which no tender of the actual material was made.

4. ———: ———: SUBSTANTIAL PERFORMANCE ONLY REQUIRED. The court instructed the jury that the defendants were liable for the carloads of blocks not inspected by them, unless they did not conform substantially to the specifications. *Held*, that the use of the word *substantially* in such connection was not erroneous.

5. ———: ———: BREACH OF BY VENDEE: DAMAGES. The contract between the plaintiff and defendants was made in the month of April, and was for blocks for seventeen hundred and fifty yards of paving, but contained no provision fixing time for delivery. The contract for paving between the defendants and the city, however, provided for thirty-five hundred yards of granite paving, besides a quantity of brick paving, and that work thereon should commence on or before April 15, and be completed on or before August 15. No demand was made for the blocks to be furnished by the plaintiff until the eighth of May, when the defendants telegraphed the plaintiff that they must ship the balance of blocks, being for twelve hundred and fifty yards of paving, within three days. Afterwards the defendants examined two of the ten carloads of blocks shipped by the plaintiff, and, finding some of them defective in quality and size, refused to receive them, without giving the plaintiff notice of their defective character, or giving him an opportunity to furnish blocks that would conform to the contract. *Held*, that the evidence warranted a recovery by the plaintiff in damages for the breach of the contract.

*Appeal from Des Moines District Court.*—HON. CHAS. H. PHELPS, Judge.

SATURDAY, OCTOBER 17, 1891.

ACTION to recover damages for the breach of an engagement to purchase paving blocks. There was a

trial by jury, and a verdict and judgment in favor of the plaintiff. The defendants appeal.—*Affirmed.*

*Tracy & Mercer* and *S. K. Tracy*, for appellants.

*P. Henry Smythe & Son*, for appellee.

ROBINSON, J.—In April, 1889, the parties to this action were bidders for a contract to be let by the city of Burlington for certain paving to be done with granite blocks or brick. Before the contract was awarded it was agreed between the parties named that, if either obtained the contract, the other should furnish to the successful bidder one-half of the paving blocks required, at the price of two dollars per yard, delivered in Burlington. The defendants were awarded the contract, which, as finally let, included both granite-block and brick paving, and provided that the work thereunder was to be commenced on or before the fifteenth day of April, 1889, and completed on or before the fifteenth day of the next August. The specifications, which were made a part of the contract, designated the quality and dimensions of the blocks to be used, and provided that in no case would the contractor be allowed to use blocks other than those described in the specifications, or which should be approved by the city engineer. The quantity of granite paving required was about thirty-five hundred yards. The plaintiff owned a granite quarry near Sioux Falls, from which he procured the blocks which he shipped to the defendants, and from which he proposed to obtain all required by his agreement. The defendants owned a quarry of similar stone a few miles distant from that of the plaintiff, from which they shipped the blocks which were actually used. The plaintiff seeks to recover the contract price for those shipped, and the difference between the contract price and the actual cost of delivering the twelve hundred and fifty yards which were not shipped. The defend-

ants deny liability on the alleged ground that the blocks shipped were not of the dimensions and quality required by their contract with the city, and were rejected by the city, and deny that the plaintiff was able to perform the agreement on his part.

There is much conflict in the evidence, but we think the jury were authorized to find the facts to be substantially as follows: As soon as the contract with the city was entered into, the plaintiff went to his quarry, opened it, and commenced getting out granite blocks. On the thirtieth day of April he wrote to the defendants at Burlington that he would ship five carloads of blocks soon, and he in fact shipped them on the seventh day of May. On the sixth day of May the plaintiff wrote to the defendants at Burlington as follows: "There is five carloads of blocks on the road. If you are in a hurry, I can put on as much force as you need soon as I get answer to this. I will send message to my foreman." On May 8, the defendants sent to the plaintiff a telegram as follows: "Letter received; must have all your blocks shipped this week; * * * ship none after Saturday." The telegram was sent on Wednesday. On the next day the plaintiff sent a telegram to the defendants as follows: "Telegram received. Will furnish blocks as per contract, within a reasonable time, but Saturday not reasonable. I expect you to keep the contract." On the tenth the defendants telegraphed to the plaintiff that they had investigated the quarry of the latter, and found capacity too limited to furnish the blocks in the near future, and could not wait for them, unless the plaintiff would pay the damages caused by the delay, and get the city to wait for the paving. On the thirteenth day of May the defendants again wrote to the plaintiff in effect complaining of delay. The proposition of the plaintiff to put on additional men, if needed, does not seem to have been otherwise answered. On the fifteenth

of May he made an additional shipment of five carloads of blocks. The defendants commenced paving the east side of the street with their own blocks, leaving the west side to be paved with blocks to be shipped by the plaintiff. Before they finished the east side the first shipment of blocks made by the plaintiff had been received in Burlington, but when the east side was finished they at once commenced paving the west side with their own blocks. When the west side was nearly half completed, and when all the blocks shipped by the plaintiff were in cars standing on the track in Burlington, the defendants for the first time had some of them hauled onto the street. Objections to them were made by some of the officials of the city, and they were taken away, and none of the blocks shipped by the plaintiff were used. Some of the blocks in question were defective in quality and size, and, although some of the witnesses for the defendants testified that less than half were suitable for use, the jury might well have found that three-fourths of them and more were equal in all respects to those laid and approved by the city. It is not expected that all of the blocks contained in such shipments as those made by the plaintiff will be equal to the standard required, but it is customary in such cases for the person to whom they are furnished to reject the defective ones. The plaintiff was able and ready to supply good blocks in lieu of those which were defective, but he was notified, after the second shipment, that the defendants refused to receive the blocks, and made no further shipments.

I. The appellants complain of the ruling of the district court which permitted the plaintiff to show that the blocks he furnished were as good as those laid by the defendants and accepted by the city. We think there was no error in such ruling. The contract lodged a discretion in the city engineer to accept blocks which

1. SALES: future delivery; agreement as to quality; performance: evidence.

were not of the kind described in the specifications, and blocks which he approved were as much within the requirements of the contract as were those which it specifically described. Therefore, evidence which showed that the blocks furnished by the plaintiff were similar and equal to those which were used by the defendants, and approved by the engineer, tended to show that the blocks so furnished were of the kind and quality required by the contract.

II. The defendants asked the court to give several instructions to the jury, which were refused. As to several of them, we need only say that, so far as they were correct and applicable to the case, they were given in substance in the charge of the court. The eighth instruction so refused was based on the theory that, if a considerable number of the blocks tendered by the plaintiff did not meet the requirements of the contract, he could not recover. The evidence did not justify this instruction, for it appeared that by the usage in such cases the defendants were required to accept the blocks which were equal to the requirements of the contract, if the plaintiff stood ready to make good the defective ones. The charge of the court on that point was, we think, fair to both parties.

2. ——: ——: ——: ——: usage: instructions to jury.

III. The ninth instruction asked by the defendants, and refused, is as follows: "If you find from the evidence that the portion of granite to be furnished by the plaintiff would amount to seventeen hundred and fifty square yards, or thirty-five carloads or thereabouts, and, if you further find that plaintiff tendered but five hundred yards, or ten carloads or thereabouts, then you are instructed plaintiff cannot recover damages of any character for that portion of which he did not tender the actual material, and your verdict upon that portion of the case should be for the defendants." The evi-

3. ——: ——: refusal of vendee to accept: remedy of vendor: tender.

dence tended to show that the plaintiff desired and offered to furnish all the blocks required by his contract, but that the defendants placed it out of their power to accept them by not examining those sent until after they had laid a large portion of the paving which was to be done with the blocks of the plaintiff, and that their conduct was, in effect, an absolute refusal to accept any of his blocks; and that the plaintiff was justified in relying upon their action as equivalent to a waiver of tender. That being the condition of the case, the instruction was properly refused.

IV. The evidence tended to show that defendants inspected but two of the ten carloads of blocks sent by the plaintiff before they rejected all of them, and that the blocks in those two cars were inferior to those in the others. The court charged the jury that, if the defendants failed to inspect a portion of the blocks, they would be liable to pay for them, unless they did not conform substantially to the specifications. The appellant complains of the use of the word "substantially." We think it was rightly used. It did not justify any material departure from the contract as to the dimensions and quality of blocks to be furnished, but required them to be in all essential particulars like those required by the contract.

4. ——: ——: substantial performance only required.

V. A careful examination of the entire record satisfies us that the verdict and judgment were fully authorized by the evidence, and that substantial justice is done by them. The course taken by the defendants shows quite clearly that they did not desire the plaintiff to furnish the blocks, but sought to prevent him from doing so. No time was fixed for their delivery, and no demand for them was made until the defendants were almost ready to use them, and then but three days' time was given in which to ship them. If the defend-

5. ——: ——: breach of by vendee: damages.

ants had desired, in good faith, to carry out the agreement on their part, they would have given the plaintiff reasonable notice of the time when the blocks would be needed, and would have made an inspection of the blocks actually on hand before laying their own; and, if they found some of the blocks defective, they should have notified plaintiff of the fact, unless it was apparent that he must have known of the defects. They were not authorized to reject all the blocks because a small portion of them were defective. The plaintiff was willing, able and ready to furnish all the blocks required by his contract within a reasonable time after demand. The contract with the city gave the defendants four months in which to do the work it contemplated, and there is nothing in the record to show that the paving with blocks was to be done before the paving with bricks, nor that the plaintiff knew that he would be expected to furnish the blocks by the eleventh day of May, until the telegram of May 8 was received. There was evidence to justify the amount of the verdict rendered, and we cannot disturb it as excessive.

What we have said disposes of all material questions discussed by counsel. The judgment of the district court is AFFIRMED.

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## JOHN H. REICHART *et al.*, Appellees, v. O. O. WILHELM *et al.*, Appellants.

## THE SAME v. MARY J. WILHELM *et al.*, Appellants.

**Deed:** DELIVERY: EVIDENCE. Where an insolvent debtor, about ten months before his death, executed two deeds, the one to his wife and the other to his son, conveying to each an undivided one-half interest in certain lands, but up to within a short time before his death con-

tinued to exercise acts of ownership over such land, and such ownership was admitted by said grantees, and after the death of said grantor the deeds were found in his dwelling-house in a box where his private papers had been kept for many years, but such box had no lock and key, and the son had access thereto as a place of deposit for his private papers, and a few days after his father's death the son took the deeds from the box, and filed them for record, *held*, that the evidence did not show a delivery of the deeds, and that a conveyance by the son of his interest in said land, made after his father's death, was void as against the creditors of the father's estate.

*Appeal from Cedar District Court.*—HON. J. D. GIFFEN, Judge.

SATURDAY, OCTOBER 17, 1891.

ACTION in equity by the creditors of the estate of B. Wilhelm, deceased, against Mary J. Wilhelm, his widow, and O. O. Wilhelm, his son. The relief sought is the setting aside of certain alleged conveyances of land by the deceased to the defendants, and subjection of the property to the payment of the claims of the plaintiffs. There were decrees for the plaintiffs, and the defendants appeal.—*Affirmed.*

*Wheeler & Moffitt*, for appellants.

*Wolf & Hanley*, *W. N. Treichler* and *E. M. Brink*, for appellees.

ROTHROCK, J.—The two causes have been submitted to us upon the same abstracts and arguments, and both will be disposed of in one opinion. The actions, being in equity, are triable anew in this court, and are to be determined upon the preponderance of the evidence, and the equitable rights of the parties arising therein.

B. Wilhelm died intestate on the nineteenth day of May, 1888. His estate was insolvent. The valid claims against the estate amounted to about two thousand dollars. The greater part of this sum will be lost

to the creditors if the land in controversy should be held to be the property of the widow and son, who are defendants in these actions. There is no dispute that B. Wilhelm was the owner of the land until about July 27, 1887. The defendants claim that on that day B. Wilhelm executed two deeds of the land, which conveyed to them each an undivided half of the same, and that said deeds were made for a valuable and full consideration. It is claimed in behalf of the creditors that these deeds were never delivered to the defendants by B. Wilhelm, nor by anyone for him. The undisputed fact is that when he died the deeds were found in his dwelling-house in a box where his private papers had been kept for many years. The box belonged to the deceased, and he had control of it. There was no lock and key to it, and the defendants had access to it, and it was also used by O. O. Wilhelm as a place of deposit for his private papers. Some three days after the death of B. Wilhelm the defendant, O. O. Wilhelm, took these deeds from the box, and filed them for record in the county recorder's office. The defendants both testify to certain facts which transpired at about the time of the date of the deeds, which tend in some degree to show an actual delivery. They state, or perhaps it is more accurate to say, that O. O. Wilhelm testified that the deeds were delivered. But the whole record is barren of any evidence of a delivery other than the placing of the deeds in the box. It is true that both of the defendants had access to the box, but in view of the fact that the deeds were not recorded, and the further fact of the relation of the parties, and the other evidence in the case, our conclusion is that it ought to be held as established by the evidence that there was no delivery of the deeds. We need not recite the other evidence in the case. It consists of acts of ownership exercised over the land by B. Wilhelm up to within a very short timebefore his death;

the admissions of both of the defendants touching such ownership; the practical absorption of the whole of the personal estate by O. O. Wilhelm, to the exclusion of the creditors, upon what appears to be a very doubtful right; the recital in the deed to Mary J. Wilhelm is that it was in consideration of "love and affection and other values and one dollar," and other facts appearing of record.

Having found that there was no delivery of the deeds, the title to the land did not pass thereby; and a deed of the undivided half of the land, made by O. O. Wilhelm to Mary J. Wilhelm, after the death of B. Wilhelm, was void as to the creditors, because he had no title to convey. In our opinion the decree is fully supported by the evidence. AFFIRMED.

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## C. C. KELLOGG, Appellee, v. E. E. COLBY *et al.*, Appellants.

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| 83 | 513 |
| 90 | 455 |
| 83 | 513 |
| 96 | 16 |
| 83 | 513 |
| 110 | 445 |
| 83 | 513 |
| 124 | 592 |

1. **Appeal:** NOTICE: SERVICE UPON COPARTIES: JURISDICTION. Where a part only of several coparties appeal, the failure of the appellant to serve notice of the appeal upon the other coparties, as provided by section 3174, of the Code, will not affect the jurisdiction of the court to determine such questions as affect only the appellant and the adverse party.

2. **Mortgage:** ASSUMPTION BY SUBSEQUENT GRANTEE: PAYMENT: SUBROGATION. Where one purchases real estate subject to a mortgage, which he assumes and agrees to pay as part of the consideration for said property, he will not be entitled upon the payment of said mortgage to be subrogated to the rights of the mortgagee, and enforce the same against a purchaser of the property at foreclosure sale under a second mortgage.

*Appeal from Humboldt District Court.*—HON. LOT THOMAS, Judge.

MONDAY, OCTOBER 19, 1891.

BESIDES the appellant, the defendants are A. J. Parker and Estella B. Fuller. The action is to foreclose a mortgage on land described as "large lot 1, in Lathrop's addition to the town of Humboldt," against H. J. Parker, as debtor, and the other defendants as having an interest therein. Barring one or two other facts that we regard as unimportant, the cause was submitted on the following stipulation of facts:

"It is hereby agreed and stipulated by and between all the parties to the above-entitled cause that the following is a true statement of facts, and that the same shall be used as such on the trial of said cause: *First.* That, on the fifth day of October, 1881, Welcome Ellis was the owner in fee simple of the premises described in plaintiff's petition, and on that date mortgaged the same to one S. A. Johnson, to secure a note of the same date for two hundred and fifty dollars, with interest at nine per cent. per annum, due October 5, 1886, and that said mortgage was duly recorded on the day of its date, and that Exhibits 1 and 2, respectively, hereto attached, are copies of said note and mortgage, and that no part of the same, principal or interest, was ever paid, except as hereinafter stated. *Second.* That, on the twenty-fourth day of February, 1882, said Ellis mortgaged said premises to the defendant, E. E. Colby, to secure the payment of a note of four hundred dollars, with interest at ten per cent., due, two hundred dollars thereof January 1, 1883, and two hundred dollars thereof January 1, 1884, and that said mortgage contained a warranty against all incumbrance 'except a mortgage of two hundred and fifty dollars,' and that said mortgage to Colby was duly recorded February 27, 1882. *Third.* That said Ellis, on the nineteenth day of July, 1882, sold said premises by warranty deed to Estella B. Fuller for the

sum of seven hundred and fifty dollars, and said deed was duly recorded on the thirty-first day of July, 1882, which deed was subject to the mortgage of two hundred and fifty dollars to S. A. Johnson aforesaid. *Fourth.* That said E. E. Colby sold and assigned his notes and mortgage of four hundred dollars to one Braley, who brought suit for foreclosure of the same in the circuit court of Humboldt county, Iowa, on the—— day of——, 1883, making the plaintiff herein C. C. Kellogg, and the defendants, E. E. Colby, H. J. Parker and Estella B. Fuller and Welcome Ellis, parties defendant, and that such action was had therein that, on or about the twenty-eighth of July, 1885, judgment and decree were rendered therein in said circuit court, foreclosing said mortgage against all the defendants therein. *Fifth.* That, under and by virtue of said judgment and decree, said property was sold by the sheriff of said county on the sixteenth of November, 1885, and a certificate of sale issued to E. E. Colby, defendant herein, who purchased the same at said sale for the sum of six hundred and fifty dollars; and, on the seventeenth of January, 1887, the said sheriff made to E. E. Colby, who was still the holder of said certificate, his sheriff's deed of said premises, and the said deed was on the same day duly filed for record and recorded in Humboldt county. *Sixth.* That said judgment and decree were never reversed or set aside, and no redemption was ever made from said sale thereunder. *Seventh.* That, on the eleventh of September, 1882, said Estella B. Fuller sold said premises to C. C. Kellogg, the plaintiff herein, by warranty deed, subject to the aforesaid Johnson mortgage, payment of which was assumed by the grantee as part of the purchase price, which was eight hundred dollars, as recited in said deed. *Eighth.* That, on the eighteenth of April, 1883, said Kellogg, the plaintiff, sold said premises by full warranty deed, to the defendant, H. J. Parker. *Ninth.* That said deed from plaintiff herein to defendant, H. J. Parker,

expressed a consideration of eight hundred dollars; that no money was paid at the time of the sale, but that defendant Parker gave to the plaintiff his several notes and mortgage for the sum of six hundred and twenty-five dollars, with eight-per-cent. interest, which are the notes and mortgage sued on herein, and the exhibits attached to plaintiff's petition are copies thereof; and that defendant Parker also conveyed to plaintiff a certain town lot, which, in the trade, was called one hundred and seventy-five dollars, but which plaintiff afterwards sold for one hundred dollars. *Tenth.* That the defendant, H. J. Parker, has paid to plaintiff interest upon the notes and mortgage sued on herein as follows, to-wit: April 10, 1884, he paid fifty dollars; October 10, 1884, he paid twenty-five dollars; April 10, 1885, he paid twenty-five dollars; October 10, 1885, he paid twenty-five dollars; April 10, 1886, he paid twenty-five dollars. *Eleventh.* That said H. J. Parker, on the fourteenth of June, 1887, sold said premises to E. E. Colby by warranty deed, copy of which is hereto attached and marked 'Exhibit 5,' and to which reference is made for the recitals and covenants therein contained. *Twelfth.* That the consideration expressed in said deed from Parker to Colby is eight hundred dollars, but in truth and in fact the only consideration paid, or agreed to be paid, for said conveyance was that Colby should pay the expense of making the same, and that said Colby should pay all claims and costs thereon that should be adjudged valid on account of the notes and mortgage given by said Parker to the plaintiff Kellogg, being the notes set forth in plaintiff's petition, which agreement by said Colby was in writing. *Thirteenth.* That the actual consideration paid by the plaintiff to the defendant, Estella B. Fuller, for the conveyance mentioned in paragraph 7 hereof was as follows, to-wit: One hundred and fifty dollars ($150) was paid in cash at

the date of deed; three hundred and fifty dollars ($350) was deposited in bank by plaintiff, to be paid when all incumbrances save and except the Johnson mortgage, mentioned in paragraph 1 hereof, should be removed; and the payment of said Johnson mortgage was assumed by the plaintiff. *Fourteenth.* The plaintiff Kellogg paid the said Johnson mortgage at maturity, intending thereby to subrogate himself, and be subrogated to all the rights of the said S. A. Johnson in and to said note and mortgage, and the property covered thereby. *Fifteenth.* That, upon the conveyance (set forth in paragraph 8 hereof) by plaintiff to the defendant Parker, said Parker entered into the possession of the premises conveyed, and remained in the undisturbed possession and use of the same until January 17, 1887; but who has been in possession since that date shall be determined by evidence to be hereafter taken in this cause."

Under the facts thus stated, the plaintiff sought either a judgment of foreclosure against the defendant Parker, or that, if denied, he be subrogated to the rights of Johnson under the mortgage paid by him. The defendant Parker, by way of counterclaim, sought to recover against the plaintiff on his covenants of warranty, because of the Colby mortgage, under which Braley foreclosed, and the sheriff's deed was made to Colby. The defendant Colby pleads, as against the plaintiff's claim for judgment of foreclosure or subrogation, his sheriff's deed under the foreclosure sale, and asks to be dismissed, with costs. The defendant, Estella B. Fuller, pleads that there has been no eviction of plaintiff from the land; that the title of the defendant Colby has been conveyed to one A. E. Clark, who now has a perfect title to the land, and tenders the same to the plaintiff. The defendants, Colby and Parker, deny that the title of the land is in Clark, and not in defendant Colby, and the plaintiff asks that the

defendant Fuller be required to perfect his title, or that he have his judgment of foreclosure against her, or adequate relief. The district court gave judgment dismissing the plaintiff's petition for foreclosure against Parker, and gave to Parker a judgment against the plaintiff, because of a breach of his covenants of warranty, for one hundred and thirty-three dollars, decreed the title tendered to Estella B. Fuller to perfect the title in the plaintiff void, and gave judgment for the plaintiff against Estella B. Fuller for forty-eight hundred and fifty dollars and eighty-nine cents. It further gave judgment subrogating the plaintiff to the rights of Johnson under his mortgage, and made the same a lien on the land superior to defendant Colby's title. The defendant Colby appeals.—*Reversed.*

*A. D. Bicknell* and *P. Finch*, for appellant.

*G. S. Garfield* and *R. M. Wright*, for appellee.

GRANGER, J.—I. There is a motion to dismiss the appeal for the reason that the appellant had served no notice of appeal on his codefendants, Fuller and Parker, under the requirements of Code, section 3174, as follows: "A part of several coparties may appeal; but in such cases they must serve notice of the appeal upon all the other coparties, and file the proof thereof with the clerk of the supreme court." In *Moore v. Held*, 73 Iowa, 538, it is held that the service of the notice under said section is not jurisdictional. It is also there held that, where there is a failure to serve such notice on all the coparties, this court has jurisdiction to determine such questions as affect only the appellant and the adverse party.

1. APPEAL: notice: service upon coparties: jurisdiction.

The only question presented by the appeal is whether or not the land now owned by the defendant Colby is liable for the Johnson mortgage under the

judgment subrogating the plaintiff to the rights of Johnson. The judgments of the district court affecting the interests of the defendants, Fuller and Parker, are not appealed from, and hence, as to them, are conclusive, and of such a character that the determination of the question presented by the appeal can in no manner affect them. It is only contended that, if the deed tendered by Fuller to the plaintiff was void, "it would destroy all defenses of Parker based on the alleged breach of warranty." But Parker has not appealed, and the decree that the deed is void is conclusive, and we think has support in the record. The motion to dismiss the appeal must be overruled.

II. The plaintiff, by purchasing the land under an agreement to pay the Johnson mortgage as a part of the purchase price, not only took the land subject to the mortgage, but assumed a personal liability to Johnson for its payment. When Colby purchased the land under the foreclosure judgment, the record gave to him notice of this undertaking and obligation on the part of the plaintiff. It is true that Colby, when he purchased the land at the foreclosure sale, had notice from the record that the Johnson mortgage was unpaid, and a prior lien, for which his land might become liable; but he, at the same time, had knowledge of the plaintiff's personal undertaking to pay the debt. As between the plaintiff and Johnson, this personal obligation never ceased until the debt was paid. In paying the debt, he simply paid for the land he bought from Fuller, and which he afterwards sold to Parker with covenants against incumbrances. The title of the land now vests in Colby by virtue of the sheriff's deed. The judgment below in its effect is that, for some reason, the plaintiff's obligation to pay the Johnson mortgage became secondary; for the right of subrogation never follows an actual primary liability. Jones on

2. MORTGAGE: assumption by subsequent grantee: payment: subrogation.

Mortgages, sec. 792; Sheldon on Subrogation, sec.26; Pomeroy on Equity Jurisprudence, secs. 707, 1212, note 1. Looking to the appellee's argument for grounds to sustain the action of the court, it is said that "the land being the primary fund, and the plaintiff being also personally held for payment, * * * he had the right to pay the mortgage, and be subrogated to Johnson's rights." Authorities are cited announcing some general principles as to subrogation, but none supporting the rule as claimed. It is not a case, as we understand, where the "land is the primary fund" for the payment. The plaintiff's personal obligation was first,—primary,—against which he could plead no excuse, and that obligation existed to the moment he paid the debt. The obligation was entirely uninfluenced by Colby's conduct or situation as to the land.

Importance is attached to the fact that the plaintiff paid the mortgage, intending to be subrogated to the rights of Johnson. But the intent so to do could avail him nothing, in the absence of a legal right to be so subrogated. His obligation was not of a character to entitle him to such a right. It will be seen, by reference to the facts, that Parker made to Colby a deed of the land June 14, 1887, and some importance is attached to that fact by the appellee; but nothing more need be said than that Colby took nothing by that deed.

The judgments in the case that are now conclusive show that the rights of Parker were lost because of the breach of the covenants of warranty by the plaintiff to Parker. Colby, as a consideration for the deed, merely agreed to pay the notes that Parker gave to the plaintiff, if adjudged valid. They were adjudged of no force because of the failure of title from the plaintiff to Parker. We are clearly of the opinion that the court erred in subrogating the plaintiff to the rights of Johnson under the mortgage. See, in support of our conclusion: *Goodyear v. Goodyear*, 72 Iowa, 329;

*Byington v. Fountain*, 61 Iowa, 512; *Massie v. Mann*, 17 Iowa, 131; *Morrison v. Morrison*, 38 Iowa, 73. There are numerous other cases to the same effect. REVERSED.

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# MARTHA ANN BACON *et al.*, Appellants, v. R. J. CHASE *et al.*, Appellees.

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| 99 | 82 |
| 99 | 350 |
| 83 | 521 |
| 105 | 185 |
| 83 | 521 |
| 116 | 274 |
| 83 | 521 |
| 118 | 583 |
| 83 | 521 |
| 119 | 43 |
| 83 | 521 |
| 133 | 576 |

1. **Administrator's Sale:** JURISDICTION OF COURT. WAIVER OF NOTICE: COLLATERAL ATTACK. Where about four years after the issuance of letters of administration in this state upon the estate of a deceased non-resident, during which time no claims had been filed against the estate, the administrator made application for permission to sell certain real estate, situated in the same county, for the payment of debts, and accompanying said application was a statement of account in favor of the administrator in a sum about equal to the value of said real estate, upon which was indorsed the statement, that said account was just and true, and that the goods and estate of the deceased in Iowa ought to be sold for the purpose of liquidating the same, which indorsement was signed by the administrator of the same estate in Massachusetts, and by the widow of the deceased, also a resident of said state, on behalf of herself and as guardian for her minor children, *held*, that the indorsement upon said account operated as a waiver of notice by the widow, of the application to sell and that, the court having jurisdiction of the subject-matter, a sale of said real estate in pursuance of an order of court upon said application was valid as against the widow.

2. ———: ———: LACHES: ADVERSE POSSESSION. Nearly thirty years after the above order of sale the widow and children of the deceased, who had continuously during all that time been residents of Massachusetts, commenced this action to quiet their title to said real estate, offering to make payment of the money paid to the administrator for the land, together with all legal taxes and interest. It was then about twenty-six years after the administrator's deed to said land had been recorded, and about ten years after the youngest heir became of age. During all that time the widow had known that her husband died seized of said land, and of the above proceedings and sale, and the same facts were known to the children for many years after the commencement of this suit, but no claim of ownership was ever made by any of them until solicited to give a quitclaim deed a

short time before the commencement of this action. *Held*, that the plaintiffs were guilty of laches in not sooner asserting their rights in the land, and that they were now barred and estopped from claiming title thereto.

3. ———: ———: ———: ———. The adverse title of the defendants being of record, *held*, that the fact that during the time when the land in question was used as a farm a forty-acre tract of low land was not cultivated, and that after the land was platted into town lots only a few thereof had been occupied up to the commencement of this action, would not excuse the laches of the plaintiff, nor prevent the running of the statute of limitations.

4. ———: CONSIDERATION: PAYMENT. The debt for the payment of which the land in question was sold was one owing the administrator, and the land was sold to one P., to whom the administrator was indebted, and for that reason no money was actually paid by P. *Held*, that, under the circumstances of this case, the sale would not for such reason be deemed invalid.

*Appeal from Woodbury District Court.*—HON. GEORGE W. WAKEFIELD, Judge.

MONDAY, OCTOBER 19, 1891.

NOVEMBER 17, 1888, M. A. Bacon, widow, and Moses C. Bacon, Leonard R. Bacon and Sarah Tule, sole heirs of Moses W. Bacon, filed their petition entitled as in equity against R. J. Chase and fifty-five other defendants. They alleged that Moses W. Bacon died seized of the northwest quarter of the southeast quarter of section 27, township 89, range 47, Woodbury county, Iowa, and that they became the owners thereof by inheritance; that the defendants are making claim of title thereto by virtue of a pretended deed of conveyance from Horace C. Bacon, as administrator of the estate of Moses W. Bacon, deceased, which they alleged, for various reasons set out, is absolutely void. They offered to pay to the defendants all money paid to Horace C. Bacon for the property, and all legal taxes paid by the defendants and their grantees, with interest, and ask to be quieted in their title. E. J. Haynes intervened, and claims to own the undivided twenty-

fifth part of the land in connection with the plaintiffs by conveyance from Moses C. Bacon since the commencement of this action, and joins with the plaintiffs in the allegations, tender and prayer in their petition.

R. J. Chase and forty-four other defendants join in answering. They admitted that the legal title to the land was in Moses W. Bacon at his death, and allege that Horace C. Bacon was duly appointed administrator of the estate in this state, and that such proceedings were had in the county court of Woodbury county as that on December 15, 1858, he was authorized to sell said land to pay debts; that on November 22, 1860, he sold and conveyed the same to Joseph C. Plummer, which sale and conveyance were approved by the judge of said court December 15, 1860, and the deed to Plummer duly recorded April 11, 1862, and under which the defendands hold title; that at all times since these defendants, and those under whom they claim title, have had the care, custody and possession of the land and have paid taxes thereon; that the defendant Chase caused the same to be platted into lots, blocks, streets and alleys, as an addition to Sioux City, and that the other defendants, or their grantors, have purchased and hold title to the lots, and many of them have built upon and improved the same; that for twenty-eight years the plaintiffs have allowed these defendants and their grantors to pay the taxes, exercise acts of ownership and possession over the land, to buy and sell to persons having no knowledge of the plaintiffs' claim, and to expend money upon the lands, without giving warning or notice of any claim thereto. The defendants alleged that the plaintiffs are barred, foreclosed and estopped from claiming any interest in the land by reason of the administrator's sale and conveyance, by the statute of limitations, and by their laches in asserting any interest therein.

The plaintiffs, in reply, alleged that the proceedings in the county court of Woodbury county for the sale of the lands were without jurisdiction, because no claim or indebtedness was proved against the estate; that none existed requiring such sale; that the application and order of the court did not name or describe the real estate to be sold; that the writ failed to prescribe any notice to be given; that the application and order were made on the same day; that no notice of said application was given to the plaintiffs, or any of them; that the court had no jurisdiction over them, or their interests in said property; that the order was not made nor the application heard at any regular session, nor at an adjournment of a regular session, nor at a time when said court had authority to hear the application or make the order; that no appearance was made by or for the plaintiffs, or any of them, nor was a guardian *ad litem* appointed to defend for the plaintiffs, Moses C., Leonard R. and Sarah T., then minors under the age of fourteen; that the pretended sale by the administrator was made nearly four years after his appointment, nearly two years after the order, at a time when no claims or debts had been approved or allowed against the estate, and when all such debts were barred; that it was a private sale, in another state, without actual consideration, and for an expressed consideration less than the appraised value of the property; that no report of the sale was ever made to the court, or the sale approved by the judge thereof. The plaintiffs further reply that they were and have been residents of Massachusetts; never resided in Iowa; that they were wholly ignorant as to the property or business of Moses W. Bacon in Sioux City; that they did not know Horace C. Bacon had been appointed administrator, and had no notice or knowledge of the proceedings in the county court for the sale of said property; that the land was vacant and unoccupied

until the fall of 1887, and that the plaintiffs had no knowledge of the platting and improvements thereafter made thereon, until a few weeks before bringing this action.

Jeremiah W. White filed his petition of intervention, claiming mortgage liens upon certain lots, as platted by the defendant Chase, from parties holding under Chase, and unites with the defendants in praying that the plaintiffs' petition be dismissed. The case was submitted to the court as an equity cause, and on March 17, 1890, a decree was entered dismissing the plaintiffs' petition, and giving judgment against the plaintiffs for costs, from which judgment and decree they appeal. *Affirmed.*

*Hubbard, Spalding & Taylor*, for appellants.

*Joy, Hudson, Call & Joy, J. H. & C. M. Swan* and *Craig L. Wright*, for appellees.

GIVEN, J.—It will be seen from the foregoing statement of the pleadings that the controlling questions between the plaintiffs and the defendants are whether the proceedings had in the county court of Woodbury county for the sale of real estate, and the deed made to Joseph C. Plummer, under whom the defendants claim title, was such as to divest the plaintiffs of their title to the land, or, in other words, whether that proceeding was legal; if the proceedings were not legal, then whether the plaintiffs are barred from now asserting their title by reason of their delay in doing so.

1. ADMINISTRATOR'S sale: jurisdiction of court: waiver of notice: collateral attack.

The record of the county court shows that Horace C. Bacon was duly appointed and qualified as administrator of the estate of Moses W. Bacon in Iowa, December 1, 1856; that the estate, consisting entirely of interests

in real estate, was appraised at sixty-eight hundred and forty-nine dollars and ninety-five cents. December 15, 1858, the administrator filed his petition, stating that there was no personal property to pay debts, and asking to be licensed "to sell so much of the real estate of said deceased as may be sufficient for that purpose." Accompanying this petition was an account against the estate, and in favor of Horace C. Bacon, for sixty-two hundred and forty-three dollars and ninety-eight cents, upon which was an indorsement as follows:

"We, William Richardson, administrator of the goods and estate of said deceased, in the commonwealth of Massachusetts, and Martha Ann Bacon, widow, and guardian of the minor children of said deceased, hereby certify that the above statement of claim against the estate of said deceased is just and true, and that the goods and estate of said deceased in Iowa ought to be sold for the purpose of liquidating the same.

"WILLIAM RICHARDSON,
"Administrator,
"MARTHA A. BACON,
"Guardian."

On the same day an order was entered of record, signed by the judge, that the administrator "proceed to sell, at public or private sale, so much of the decedent's real estate as will pay all the debts of said decedent, together with all incidental expenses and costs; and that said Horace C. Bacon, administrator, is hereby authorized to execute to the purchaser a valid conveyance of all the rights and interest of the said deceased at the time of his death in and to the real estate by him sold." November 22, 1860, Horace C. Bacon, administrator, executed a deed of conveyance to Joseph C. Plummer, conveying to him, by virtue of this order, certain real estate, including that in question, upon which deed is an indorsement as follows:

"STATE OF IOWA,
"Woodbury County.

"Be it known that on this fifteenth day of December, A. D. 1860, after a careful examination of the above deed of conveyance, and the acts of H. C. Bacon, administrator, in executing the same, I hereby approve of such conveyance and sale. In witness whereof I have hereunto set my hand and seal.

"JOHN P. ALLISON,
"County Judge Woodbury County, Iowa."

This deed was filed for record April 11, 1862, and duly recorded.

It is a well-settled principle of law that only such objections as go to the jurisdiction of the county court can be raised in this collateral attack upon the proceedings and judgment of that court. If that court had jurisdiction of the subject-matter and of the persons interested the proceedings will be conclusively presumed to have been legally done. *Morrow v. Weed*, 4 Iowa, 77; *Wade v. Carpenter*, 4 Iowa, 361; *Little v. Sinnett*, 7 Iowa, 324; *Long v. Burnett*, 13 Iowa, 28; *Pursley v. Hayes*, 22 Iowa, 11; *Shawhan v. Loffer*, 24 Iowa, 217; *Read v. Howe*, 39 Iowa, 558; *Tharp v. Brenneman*, 41 Iowa, 251; *Hilton v. Budgett*, 43 Iowa, 684; *Lees v. Wetmore*, 58 Iowa, 178; *Stanley v. Noble*, 59 Iowa, 668. The land and administration being in Woodbury county, and a petition being filed, the county court had unquestioned jurisdiction of the subject-matter. The contention is whether it had jurisdiction of the plaintiffs.

Jurisdiction of these persons could only be acquired by the service of such notice and in such manner as is provided by law, or by their waiving such notice or voluntarily appearing. The plaintiffs were at all times residents of Massachusetts, and neither of them ever was in Iowa. The heirs were minors and all under fourteen years of age. They resided with, and were in the care and custody of, their mother, Martha Ann

Bacon, and each testifies that no notice of the proceedings to sell the land was ever served upon them. There is testimony showing that in the earlier years of the county's history the files of the county court were insecurely kept, and papers liable to be lost. It is urged that from this fact, and the presumption that arises from the court's exercising jurisdiction, we may infer that notice was served upon all the plaintiffs. Concede that there is nothing in the record aside from this presumption that any notice was prescribed or served, yet it is very clear that Mrs. Bacon did sign this indorsement for herself as widow and as guardian of her children, and thereby consented to granting the order for the sale of real estate to pay the claim of Horace C. Bacon, and equally clear, we think, that she thereby submitted herself to the jurisdiction of the county court in that proceeding. The statute in force at the time provided that, before an order could be made authorizing a sale of land by an administrator, "such notice as the court may prescribe must be given to all the persons interested in such real estate." The record does not disclose that any notice was prescribed, but it is contended that the court might have prescribed notice to Mrs. Bacon alone. If the court might have prescribed notice to the mother and guardian alone, there would seem to be no good reason why it would not acquire jurisdiction upon her waiver of notice and consent to the order.

Our attention is called to the statute requiring notice to minors under fourteen to be served upon the minor and also on the father, mother or guardian; but this is not a question as to the manner of service, but whether the consent of the mother, for herself and as guardian, to the making of the order sought, gave jurisdiction as to herself and the minors. The matter to be defended against was the right of Horace C. Bacon, administrator, to have an order to sell real

estate for the payment of the debt claimed by him of the estate. Mrs. Bacon, for herself and as guardian of her children, consented to the making of such an order, and for the payment of that particular debt. It is contended that, had notice to her as widow and guardian alone been prescribed and served, the court would have had jurisdiction of the persons of all these plaintiffs, and that as the court could have prescribed such notice it might act upon a waiver of notice, and consent to the order by Mrs. Bacon, for herself, and as guardian. In the view that we take of the remaining question, we need not determine whether the consent of Mrs. Bacon was sufficient to confer jurisdiction as to the minors. We think, however, that this waiver and consent is entitled to consideration in determining whether the plaintiffs are barred and estopped from now claiming the land by reason of laches.

Our next inquiry is whether the plaintiffs are barred and estopped from now claiming title to the land by reason of their delay in doing so. It is said in argument that this cause presents merely a contest of legal title, but the case was brought, and has been prosecuted without objection, as in equity, and both parties invoked equitable considerations in support of their claims; therefore, the case must be considered as an equitable action on this appeal. It is a familiar rule of equity that there must be conscience, good faith and reasonable diligence on the part of the party asking relief, to call into action the powers of a court of equity. *McKnight v. Taylor*, 1 How. 161; *Brown v. Buena Vista Co.*, 95 U. S. 157. In the latter case it is said: "The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, muniments of evidence

2. —: —: laches: adverse possession.

and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose and welfare of society. The departure from it would open a field to the evils intended to be excluded." See, also, *New Albany v. Burke*, 11 Wall. 107; *Fraker v. Houck*, 36 Fed. Rep. 403.

The law of laches is more especially applicable to cases where a party cognizant of his rights does not take steps to enforce them while they are open to him, but lies by and suffers other parties to incur expense, etc. *Tash v. Adams*, 10 Cush. 252. In *Carpenter v. Carpenter*, 70 Ill. 463, the court says: "We are aware of no principle of equity that will permit the complainant to abandon his property for eighteen years, when the records of the county and the notorious acts of the defendants would have shown him at any time that the defendants were claiming to be the owners." In *The Key City*, 14 Wall. 653, it is said: "Long acquiescence or laches can be excused only by showing some actual hindrance or delay caused by the fraud or concealment of the opposite party, which will appeal to the conscience of the chancellor." It has been uniformly held in this state that the statute of limitations applies equally in courts of equity as in courts of law. *Phares v. Walters*, 6 Iowa, 106; *Newman v. De Lorimer*, 19 Iowa, 244; *Relf v. Eberly*, 23 Iowa, 467.

The commencement of this action was the first assertion of ownership by the plaintiffs, or either of them. It was not commenced until nearly thirty years after the order to sell was made, twenty-eight years after the sale and conveyance, twenty-six years after the deed was recorded, and about ten years after the youngest heir became of age. In explanation and excuse of this delay it is said that the plaintiffs were residents of a distant state, were never in Iowa, and were ignorant of their rights to the property. While it

is true they were residents of Massachusetts, and were never in Iowa, it is evident that Mrs. Bacon knew that her husband died seized of land in Woodbury county, and knew of the proceedings to sell, and of the sale of the same. We are equally satisfied that each of the other plaintiffs knew the same facts for many years before the commencement of this action. It is probably true, as claimed, that they believed that they had lost all rights in the land by tax sales or otherwise, and, therefore, did not sooner make claim to it. It is certainly true that they did not make any claim of ownership whatever until solicited, a short time before the commencement of the action, to give a quitclaim deed. This request prompted them to inquire, and led to the discovery of all that is now urged against the defendants' title, and the further fact that the improvement and growth of Sioux City had greatly increased the value of the land. It will be noticed that the main ground upon which the plaintiffs seek to defeat the defendants' title is that the county court, ordering the sale of the land, did not have jurisdiction of the persons of these plaintiffs for want of notice. For nearly thirty years this claim was as apparent from the record as it is now, and for more than twenty-five years the public records of Woodbury county displayed the fact that the land in question was held by this title adversely to the plaintiffs. It is manifest that the plaintiffs made no inquiry whatever, and that, had they inquired, they would at any time within twenty-five years have learned from the public records all that is now known as to the defendants' title. Knowing, as they did years ago, that Moses C. Bacon had died seized of real estate in Woodbury county, reasonable diligence required that they should have investigated as to their rights, and asserted them within the time allowed by law, instead of remaining silent and inactive until innocent parties

had invested in the land, and in its platting and improvement.

III. It is said that the land was vacant and unoccupied until recently, before the commencement of this action, and that thereafter only a few of the lots into which it was platted were actually occupied. It is contended that the plaintiffs, as the holders of the legal title, were in possession, and that there was no actual adverse possession to notify them of the defendants' claim. As already stated, the records showed this adverse title. The forty acres in question are a part of the one hundred and twenty acres sold and conveyed under the order of the county court, the whole of which composed a farm. The forty, being low ground, was not cultivated or occupied separately from the rest of the tract until it was separately conveyed. The occupation of the tract included the forty acres, and thus it was continuously and openly occupied under the title from the administrator until conveyed to the defendant Chase, and thereafter by him and his grantees. In all these years neither of the plaintiffs ever paid or offered to pay any taxes, nor in any way asserted any interest in the land. We discover nothing in the facts of the case to explain or excuse the manifest laches of the plaintiffs, nor to take the case out of the rule of the statute of limitations.

8. —: —: —: —.

IV. The further allegation, that Horace C. Bacon, administrator, sold and conveyed the land in payment of his own individual indebtedness, should probably be noticed. If this were true, it would not be available, as against these defendants, under the circumstances of the case. The fact, however, as it appears, is that the land was sold to pay a debt of the estate to Horace C. Bacon, a large part of which was for money advanced by him to pay a mortgage upon a homestead of his deceased brother, and to save it to the plaintiffs. It may be that no

4. —: consideration: payment.

money passed between him and Plummer, nor was it necessary that there should be. Plummer owed him, as administrator, for the land. He, as administrator, owed himself the debt, to pay which the land was sold, and he, in turn, personally owed Plummer.

The record and arguments are voluminous, and the questions discussed numerous; but, in our view, those which we have considered are controlling, and it is unnecessary to notice other questions discussed. Upon the whole record, we reach the conclusion that, as to Mrs. Bacon, the county court had jurisdiction, and that the sale and conveyance to Plummer are valid as to her; that, though her consent as guardian may not have given jurisdiction as to the children, they and she are alike barred from now asserting title adverse to the defendants by reason of their long delay in doing so. The judgment of the district court is AFFIRMED.

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BUTLER BROS. *et al.*, Appellees, v. J. W. DIDDY, Sheriff, Appellant.

**Chattel Mortgage:** INSOLVENCY: PREFERRING CREDITORS. Where an insolvent debtor, at the instance of an attorney for a mercantile agency, executed several mortgages upon his stock of merchandise to as many different creditors, without their knowledge, and upon the same day, for the purpose of securing a *bona fide* indebtedness, and such creditors upon being notified of the debtor's action by telegraph immediately accepted the security, and the attorney thereupon entered into possession of the property on behalf of such mortgagees, *held*, that the mortgages did not constitute a general assignment for the benefit of creditors, and, therefore, void because of preferences.

*Appeal from Dallas District Court.*—HON. A. W. WILKINSON, Judge.

TUESDAY, OCTOBER 19, 1891.

THE plaintiffs, four in number, each brought an action to recover certain goods, or their value, by virtue of certain chattel mortgages. The causes were, by agreement, consolidated for trial, and judgment entered for the plaintiffs, from which the defendant appeals. *Affirmed.*

*Cardell & Nichols* and *R. S. Barr*, for appellant.

*White & Clark* and *H. A. Hoyt*, for appellees.

GRANGER, J.—The facts and conclusions upon which the district court based its judgment appear in an opinion, or what in the record is designated a "finding of facts," as follows:

"Finding by the court: These plaintiffs each bring separate suits against the defendant, each claiming the goods in controversy under and by virtue of certain mortgages executed to them by one Alexander Boyle, the owner of said goods, and claiming they were in possession of said stock of goods under their several mortgages prior to and at the time said goods were taken by the defendant, and they now claim to be entitled to the possession of said goods. The defendant claims that he is sheriff of Dallas county, Iowa, and that as such sheriff he levied on said stock of goods under and by virtue of certain writs of attachment then in his hands. He denies the validity of the mortgages under which possession of said goods is claimed by plaintiffs, and alleges that said mortgages are fraudulent and void; that, by the execution of said mortgages by said Alexander Boyle, a general assignment was intended, or that the transaction was, in effect, an assignment; and that the same is invalid because certain creditors were therein preferred. By agreement of all the parties in open court, these several causes

were heard, tried and determined together, upon the evidence introduced herein, and the same is to be tried as an equity cause. The facts established in this case by the proof, and found by the court, are substantially as follows:

"In December, A. D. 1888, and for some time prior thereto, one Alexander Boyle was and had been engaged in Perry, Iowa, in the business of keeping a novelty notion store. He was, on the date aforesaid, indebted to a number of firms, from whom he had purchased goods for his said store. Among the creditors were these plaintiffs and the attaching creditors herein. The firm of Goldsberg Bros. & Co. held a claim of nearly one hundred and sixty dollars against said Boyle, which was on the date aforesaid in the hands of H. H. Cardell for collection. That on the twenty-seventh day of December, A. D. 1888, said Alexander Boyle was indebted to the firm of Butler Bros. for goods purchased from them for his said store in the sum of one hundred and forty dollars, and, for the purpose of securing the same, he executed to the said Butler Bros. the mortgage under which they claim the goods in controversy. That on said last-named day, to-wit, December 27, A. D. 1888, the said Alexander Boyle was then and there indebted to said Charles Schmidt for goods purchased from him for his said store in the sum of one hundred and seventy-three dollars and forty cents, and, for the purpose of securing the same, he executed to the said Charles Schmidt the mortgage under which he claims the goods in controversy. That on the date aforesaid, to-wit, December 27, A. D. 1888, the said Alexander Boyle was then and there indebted to said C. M. Linnington for goods purchased for his said store in the sum of one hundred and thirty-five dollars and forty-two cents, and, for the purpose of securing the same, he executed to the said C. M. Linnington the mortgage under which he claims

the goods in controversy. That each of said mortgages was filed for record in the recorder's office of Dallas county, Iowa, on the said twenty-seventh day of December, A. D. 1888, at 10:15 o'clock P. M. That on the twenty-eighth day of December, A. D. 1888, said Alexander Boyle, then and there being indebted to the said firm of George White & Co., for goods purchased for his said store in the sum of forty-three dollars and fifty cents, did, for the purpose of securing the same, execute to said George White & Co. the mortgage under which he claims the goods in controversy, which said mortgage was filed for record on the same day. On the morning of December 29, A. D. 1888, H. A. Hoyt, who was then acting as attorney for plaintiffs, with the mortgages in suit in his possession, and under said mortgages, took possession of the stock of goods so mortgaged to plaintiffs by said Boyle, the same being the goods in controversy; and that said Hoyt, in taking possession of said stock of goods, was acting under the express orders and directions of these plaintiffs; and he took possession of said stock of goods under the mortgages aforesaid prior to the levy of said writs of attachment by defendant; and said Boyle was so in the possession of said goods at the time the same were levied upon by the defendant under said writs of attachment. At the time of the taking of the mortgages aforesaid, said H. A. Hoyt was attorney for the R. G. Dunn Collection Agency and for the Wilber Mercantile Agency. That said mortgages were executed by said Boyle to plaintiffs at the request of said Hoyt. That at the time of the execution of said mortgages said Hoyt did not have for collection the claims secured thereby, but the said plaintiffs, immediately upon the taking of said mortgages, were by said Hoyt notified by telegram of the taking of said mortgages, and the purpose thereof, and his said acts in the taking of said mortgages were at once ratified and adopted by the said

plaintiffs. That, as to the mortgage of George White & Co., the said Hoyt was authorized and directed by the said George White & Co. to take said mortgage and secure their claim, prior to the taking of the same by him. That the several claims for which said several mortgages were given were each a valid and subsisting indebtedness in favor of said several plaintiffs, and against said Alexander Boyle, at the time of the execution of said mortgages, and that said mortgages were executed for the purpose of securing said several claims, and no general assignment was intended by the parties thereto, and each of said plaintiffs were at that time *bona fide* creditors of said Alexander Boyle to the several amounts expressed in said several mortgages; and said transaction in the execution of said mortgages was not, in effect, a general assignment. That, after the commencement of these several actions, the said J. W. Diddy was, by order of this court, appointed receiver of said stock of goods in controversy; and that, as such receiver, under the orders of this court, he sold said stock of goods for the gross sum of nine hundred and fifty-four and seventy-five-hundredths dollars, which was the fair and reasonable value of said stock of goods at said time. That the amount paid out by said receiver upon prior liens and expenses of his receivership was three hundred and twenty-seven dollars and seventy-five cents. That the net proceeds from the sale of said stock of goods was and is six hundred and twenty-seven dollars.

"Having found the foregoing facts, it is clear therefrom that in this case the plaintiffs should recover. It is clear from the proof in this case that said mortgages were executed and recorded, and that Hoyt, who was acting for said plaintiffs, was in possession of the stock of goods in controversy thereunder prior and at the time the defendant took possession thereof under said writs of attachment. Therefore, before the defendant

can defeat the plaintiffs' recovery in this case, it is incumbent upon him to establish that said mortgages are invalid on the grounds of fraud, or that the said transaction was, in effect, an assignment for the benefit of creditors, and invalid because not made for the benefit of all, and because preference was given to certain creditors. To my mind, the evidence does not so establish the invalidity of said mortgages. It is conceded in this case that no general assignment for the benefit of creditors is valid, under our Code, unless made for the benefit of all the creditors of the insolvent making the assignment. Our Code, section 2115, provides an insolvent debtor has the right to transfer all his property in the actual payment of a pre-existing debt, and such transfer is not fraudulent *per se*, even though the transferee may have knowledge of other creditors, and of the insolvency of the debtor, and such transfer, unaccompanied by actual fraud, is valid as against other creditors of the insolvent. *Cowles v. Rickets*, 1 Iowa, 582; *Lampson v. Arnold*, 19 Iowa, 479; *Southern White-Lead Co v. Haas*, 73 Iowa, 399; *Aulman v. Aulman*, 71 Iowa, 124. The statute providing that no general assignment for the benefit of creditors shall be valid, unless made for the benefit of all the creditors, applies only to general assignments, and the same does not apply to other conveyances. *Lampson v. Arnold*, 19 Iowa, 479. The execution of mortgages by an insolvent debtor, with the *bona fide* intention of securing particular creditors, does not operate as a general assignment for the benefit of creditors. *Farwell v. Jones*, 63 Iowa, 316; *Aulman v. Aulman*, 71 Iowa, 124; *Lampson v. Arnold*, 19 Iowa, 479; *Farwell v. Howard*, 26 Iowa, 381; *Kohn v. Clement*, 58 Iowa, 589; *Gage v. Parry*, 69 Iowa, 605.

"Our supreme court has uniformly held that, where mortgages were given in good faith, with the intention of securing creditors to whom they were exe-

cuted, a different character than what was intended by the parties should not be given to them. Whether such mortgage should be considered an assignment, and void, because not for the benefit of all the creditors, depends upon the intent with which it is made. If mortgages are executed, not with an honest intent to secure a valid indebtedness, but for the purpose of hindering and defrauding creditors, the same is invalid on account of the fraudulent purpose with which the same are executed. Where an insolvent executes a mortgage or mortgages not for the purpose and with the intent to secure a pre-existing indebtedness, but intending the same in fact for an assignment of all his property, divesting himself thereby of the title to all his property, and where the same is made in view of insolvency, such conveyances should be treated as an assignment. But where an assignment is not intended by the parties to the transaction, and the intention is only to secure a pre-existing indebtedness in such case, the instrument is a mortgage, and should be treated as such, even though all the property of the debtor is taken and he is left insolvent, and there are other creditors who have not been secured. Such is the rule in this state as I interpret our decisions.

"Counsel for the defendant rely upon *Burrows v. Lehndorff*, 8 Iowa, 96, and they urge that case as decisive of this one, and it may be conceded that in many respects the facts are similar. But in that case it will be observed that the mortgages were not executed in good faith as security. They were executed by the insolvent to several creditors without their knowledge or consent, and without in any manner consulting them; and it does not appear in that case that any of the creditors to whom the mortgages were so executed ever ratified the acts of the debtor, or accepted the mortgages. Indeed, the plaintiff, in that case, was one of the mortgagees, and he refused to accept the

mortgage which was executed to him. In that case it was plain that the mortgages were not executed in good faith, with an honest intent of securing creditors. While in the case under consideration, Mr. Hoyt positively testifies that the mortgages were not executed on the instance or upon the motion of the debtor, but that, on the contrary, he, acting for the collection agencies hereinbefore named, by urging on his part, induced the debtor to execute the mortgages as security for the indebtedness named therein. I do not overlook the fact that Hoyt got his information with reference to these claims from the debtor and his brother-in-law, Mr. Murray. While that is true, yet Hoyt was attorney for those collection agencies, and had authority to act for them. These plaintiffs were members of one or both of said agencies, and, upon being notified by Mr. Hoyt of his acts in the taking of this security, they promptly ratified his acts, and accepted the said mortgages.

"In *Wise v. Wilds*, 77 Iowa, 586, it will be observed that that transaction was held fraudulent and void. It was found by the trial court that the transaction was fraudulent, and that the instruments were not executed as security, and it was held in that case that there was evidence to sustain that finding, and, if the instruments were fraudulent, they were void if they were not executed to secure an indebtedness. If that was not the intention of the grantor, then that meaning should not be given to them. The establishing of either of these two facts would, of course, defeat the instruments. The case of *White v. Cotzhausen*, 9 Sup. Ct. Rep. 309, does not differ in principle from *Burrows v. Lehndorff*. In that case the transaction was not sustained, because, as therein stated, the same was 'in execution of a scheme for the appropriation of his entire estate by his family, to the exclusion of other creditors.'

"Under the evidence in this case, I cannot find that the mortgages are fraudulent. While it is true that some of the conduct on the part of Hoyt and Boyle gives rise to the suspicion that there was an effort upon their part to secure these plaintiffs in preference to the firm of Goldberg Bros. & Co., yet the facts would not warrant a stronger construction than that. In order to establish fraud, the evidence must do more than that. In order to establish fraud the evidence must do more than create a mere suspicion. When the facts constituting a transaction are consistent with an honest purpose and intent, that construction must be given them. The transactions of every man are presumed to be honest, and fraud is not considered proven until the transaction has been shown to be inconsistent with an honest purpose and intent. In view of these rules, from the evidence in this case, I do not hesitate in coming to the conclusion that the fraud alleged by the defendant has not been established, and, in the absence of fraud, with the positive evidence that these mortgages were executed for the purpose of securing these several debts, they without doubt ought to be sustained.

"I have devoted more time to the consideration of this case than usual, because it appeared that counsel on both sides had made careful preparation, and it seemed to me that each was positive that his conclusions were correct, and each fortified his convictions with an abundant authority, and I have endeavored to show herein the reasons for reaching the conclusions arrived at by me in this case. The parties to this suit having, in open court, agreed that these four cases should be tried together as an equity cause, it is, therefore, ordered that the receiver, with the funds in his hands arising from the sale of the property in controversy, first pay off his legitimate expenses as such receiver; that he next pay off the landlord's lien; that

he next pay off these four several mortgages of plaintiffs, including the costs of these several causes; and that decrees be entered in accord with these findings; to all of which findings of fact and conclusions of law both the plaintiffs and the defendant at the time duly excepted.

A. W. WILKINSON,
"Judge."

The record, to our minds, fully sustains the findings of fact, and we concur in the conclusions of law as applied thereto. As a result, the judgment below must be AFFIRMED.

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## D. S. PEDDICORD, Appellant, v. ELIJAH KILE, Appellee.

**Forcible Entry and Detainer:** EVIDENCE. In an action for forcible entry and detainer, testimony that the defendants had been in possession of the premises in question under a lease from a person named for a term of two years, and raised crops thereon, thatat the time in question they were still in possession, and that they had leased the premises for the succeeding year is admissible to explain the possession of the defendants, and to disprove that they obtained possession through force, fraud or stealth.

*Appeal from Dallas District Court.*—HON. J. H. HENDERSON, Judge.

MONDAY, OCTOBER 19, 1891.

ACTION for forcible entry and detainer. The defendants were found not guilty in justice's court, and judgment was there rendered in their favor for costs. The plaintiff thereupon removed a portion of the proceedings to the district court for review by writ of error. On the hearing in that court the judgment of the justice's court was affirmed. The plaintiff appeals. *Affirmed.*

*Cardell & Nichols*, for appellant.

*White & Clarke*, for appellee.

ROBINSON, J.—The petition filed in justice's court alleges that on the fourth day of March, 1889, the plaintiff was in the actual use, occupancy and possession of land, which was duly described; that thereafter, and while the plaintiff was in the occupancy and possession of the premises stated, the defendants, by force, intimidation, fraud and stealth entered upon the prior actual possession of the plaintiff, by breaking and cutting down the fences and gates on the premises, and driving therefrom the plaintiff's stock, and detained the premises by threats of violence, and now are in possession of and hold the same, and refuse to allow the plaintiff to enter thereon. The answer denies all the averments of the petition, excepting so much as charges that the defendants are in possession of the premises.

On the trial of the cause in justice's court one Leonard was permitted to testify that the defendants, Kile and Goldsberry, had made to him their promissory note for the rental of the premises on the eleventh day of March, 1889. Kile was permitted to testify that he had leased the premises of Leonard for the last two years, and had farmed them, raising thereon corn, oats and hay; that he had never surrendered possession of the premises, and that he was then, and had been for two years, in the actual possession of them, and had again leased them. Goldsberry was permitted to testify that Kile had been in possession of the premises for two years, and the last year had raised corn, oats and hay thereon; that he was then in possession of the premises, and had not surrendered them. The justice asked some questions of Leonard, but it does not appear that they were answered. The appellant

objected to the testimony of Leonard on the ground that it was immaterial, irrelevant and not proper cross-examination. The testimony of the other witnesses named was objected to on the ground that it was immaterial, irrelevant, and "calling for the opinion of the witness." The testimony of Goldsberry was also objected to on the ground that it was inconsistent.

The pleadings presented two questions for determination, *i. e.: First.* Did the plaintiff have actual possession of the property at the time in controversy? *Second.* Did the defendant enter upon such possession by force or intimidation or fraud or stealth? The alleged prior possession of the plaintiff was denied by the answer, and the testimony, which showed that Kile had been in possession of the premises for a term of two years, had raised crops thereon, and had not surrendered possession, was competent to show that the plaintiff did not have the possession he claimed. It was not necessary, perhaps, to show that Kile was in possession under a lease from Leonard, but that fact, coupled with the fact of his possession, tended to disprove the claim that he was in possession by force, intimidation, fraud and stealth, and to explain his possession. There is nothing to indicate any attempt to investigate the title to the premises. Whether Leonard was the owner of them, or claimed the right to lease them, does not appear to have been investigated. It is said that the statements of witnesses that Kile was in possession, and that he had not surrendered possession at the time in question, were mere expressions of opinions in regard to a matter which it was the duty of the court to ascertain and determine. Whether a person is in possession of property may be a question of law, to be determined from facts proven, but it is usually little more than a question of fact, concerning which any intelligent observer is qualified to testify. When an issue is presented as to the character and suffi-

ciency of an alleged possession the parties in interest can show the facts and protect their rights by means of cross-examining the witnesses. *Fisher v. Bennehoff*, 13 N. E. Rep. (Ill.) 154; *Knapp v. Smith*, 27 N. Y. 281. Whether the testimony of Leonard was proper on cross-examination we are unable to determine, as his testimony on direct examination is not given.

We discover no error in any matter of which complaint is made. The judgment of the district court is, therefore, AFFIRMED.

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M. A. PRESSLEY, Appellee, v. T. S. ROE, Appellant.

**Statute of Frauds:** CONTRACTS FOR SALE OF REAL ESTATE: PAROL EVIDENCE. Parol evidence of an agreement to sell and convey real estate, where part of the purchase price has been paid, is competent under section 3665 of the Code.

*Appeal from Polk District Court.*—HON. MARCUS KAVANAUGH, JR., Judge.

TUESDAY, OCTOBER 20, 1891.

ACTION to recover the amount of three promissory notes. The defendant admitted the making of the notes, and pleaded a counterclaim. There was a trial by jury, and a verdict and judgment in favor of the plaintiff. The defendant appeals.—*Reversed.*

*Jas. M. McCaughan*, for appellant.

*W. W. Phillips*, for appellee.

ROBINSON, J.—The defendant, by way of counterclaim, states, in substance, that one William Beezley

made to the plaintiff his promissory note for the sum of two hundred dollars, and to secure its payment delivered to the plaintiff an instrument which purported to convey certain lots; that the instrument was in the form of an ordinary deed of conveyance, excepting that the name of the grantee was omitted; that it was agreed between the plaintiff and Beezley that, upon the payment of the note, the instrument should be returned to Beezley, or to whomsoever he should direct; that before the maturity of his note Beezley agreed with the defendant to convey to him all his interest in the lots, and notified the plaintiff of such agreement, and directed her to deliver the instrument to the defendant upon the payment of the note which it was given to secure; that the defendant, at or about the time of the maturity of the note, tendered to the plaintiff the amount due thereon, and demanded the instrument, but the tender and demand were refused; that thereafter the plaintiff wrongfully inserted her name in the deed as grantee, and caused it to be recorded, and then conveyed the lots to M. E. Hall, who claims to own them. The defendant avers that, by reason of the alleged wrongful conversion of the lots, there is now due him the sum of five hundred and fifty dollars. The plaintiff, in reply, admits that she received the note and blank deed from Beezley, as alleged; admits that she afterwards inserted her name in the deed as grantee, and that she has conveyed the lots to M. E. Hall; but she alleges that her name was inserted in the deed after the note made by Beezley had become due, by his direction, under an agreement made with him by which she accepted the lots in payment of his note; that she took the lots for their reasonable value, without any knowledge of the alleged conveyance by Beezley to the defendant, or to any other person.

On the trial Beezley testified in behalf of the defendant, and among other things stated that, before

the maturity of his note to the plaintiff, he had agreed with the defendant to convey to him the lots, and that for such conveyance the defendant had agreed to give him twenty-five dollars and pay his note to the plaintiff; that the agreement was verbal, but at the time it was made the defendant paid him money and other property as part of the agreed consideration; and that since this action was commenced he had executed and delivered to the defendant a quitclaim deed for the lots. Beezley also testified that he notified the plaintiff of his agreement with the defendant, and directed her to deliver to him the deed upon payment of the note for which it was security. Other evidence was given which tended to sustain the counterclaim. The plaintiff objected to the evidence as to the sale by Beezley to the defendant, on the ground that it was incompetent because it was not in writing, and signed by the parties, and moved the court to strike from the record all the evidence introduced by the defendant in support of his counterclaim for the reason stated. The motion was sustained, and the correctness of that ruling is presented to us for determination.

The motion to strike seems to have been made and sustained on the theory that, as no deed of conveyance had been given by Beezley to the defendant before this action was commenced, the evidence against which the motion was directed was incompetent under the statute of frauds. For the purposes of this case the deed given to the defendant may be disregarded. The rights of the defendant and Beezley were fixed by the verbal agreement of sale, and the payment of a part of the consideration. That such agreement was entered into, and such partial payment was made, is not in any manner contradicted; and the testimony of Beezley to the fact of payment was competent, under section 3665 of the Code. Whether it was also competent under section 3667 we need not determine. The appel-

lee claims, in effect, that the ruling on the motion was not material, because she had no knowledge of the alleged sale until after she had accepted the deed for the lots in payment of her note against Beezley, but we do not understand that the evidence necessarily shows that to be the case.

We think the court erred in sustaining the motion, and that the ruling may have been prejudicial. REVERSED.

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# J. H. BOGGESS, Appellant, v. T. H. READ, Appellee.

1. **New Trial**: NEWLY DISCOVERED EVIDENCE: CONSTRUCTION OF TERM "CUMULATIVE." Where the newly discovered evidence for which a new trial is asked is of new facts or acts tending to favor an ultimate fact in issue, and is not merely additional proof of the same facts or acts of which evidence was offered on the trial in proof of such ultimate fact, it is not to be deemed cumulative within the rules pertaining to granting of new trials.

2. ———: ———: SHOWING OF DILIGENCE. As showing diligence to obtain such newly discovered evidence before the former trial the defendant alleged that before said trial he made inquiry of a great many persons whom he supposed had knowledge, or who would be likely to have knowledge, of the matters in issue in said case, and in each and every instance pursued each and every line or hint of evidence with diligence, to the full extent of his ability. *Held*, that the application for new trial was not deficient in the showing of diligence because the names of the persons inquired of by the defendant were not set out.

3. ———: ——— :ACTION FOR SLANDER: PLEA OF JUSTIFICATION. Under the provisions of section 2837 of the Code, entitling a party to a new trial upon the ground of newly discovered evidence, without exception as to any class of cases, a defendant in an action for slander whose defense is a plea of justification may have a new trial upon the above ground.

*Appeal from Page District Court.*—HON. N. W. MACY, Judge.

TUESDAY, OCTOBER 20, 1891.

THE plaintiff's cause of action is based on the alleged publication of certain false and slanderous statements pertaining to the plaintiff, who is a minister of the gospel, to the effect that he was dishonest and lewd. The trial presented an issue of facts as to the conduct of the plaintiff in having illicit intercourse with one Mrs. Smith, and considerable testimony was adduced tending to establish the fact, as well as against it. The trial resulted in a verdict for the plaintiff. The defendant moved for a new trial upon various grounds, and among them that of newly discovered evidence. The court sustained the motion, specifying in its order that it was "granted on the ground of newly discovered evidence as set forth in the motion." From the order both parties appealed; that of the plaintiff being from the order granting a new trial, and that of the defendant from the refusal of the court to grant the new trial upon other grounds set forth in the motion. The plaintiff, in the consideration of the case, will be treated as appellant.—*Affirmed.*

*C. S. Keenan* and *S. M. McPherson*, for appellant.

*Harl & McCabe* and *Clark & Hill*, for appellee.

GRANGER, J.—I. The only question presented by the plaintiff's appeal is as to the correctness of the court's ruling in granting a new trial. Three separate assignments are urged against the action of the court: *First.* That the newly discovered evidence is cumulative; *second*, that the defendant fails to show diligence in securing the evidence for the trial; and, *third*, that a new trial should not be granted, as a matter of law, for newly discovered

1. NEW TRIAL: newly discovered evidence: construction of term "cumulative."

evidence, where the defense is a plea of justification. The assignments will be noticed separately.

There is some danger in a court of last resort attempting to definitely define the term "cumulative," as applied to evidence. The rule is recognized that a new trial will not be granted for newly discovered evidence when it is merely cumulative. There would certainly be great danger in giving to the term its most comprehensive sense, for the law provides for a new trial because of newly discovered evidence, and a new trial is another examination of the same issues of fact. Code, sec. 2837. In practice, the first trial is always upon evidence directed to the issues. In a literal sense, that is cumulative that adds to what already is. Now, if a new trial is to be refused where it would be cumulative of evidence that tends to establish the ultimate facts or issues in the case, then the statute as to new trials for newly discovered evidence would be practically inoperative, because the application would always be because of cumulative evidence. Such a construction, so far as we know, has never been given in the application of the law as to cumulative evidence. It is urged upon us, on the authority of *First National Bank v. Charter Oak Ins. Co.*, 40 Iowa, 572, that, whenever the evidence is additional, then it is cumulative; but we think the case is authority only for a rule that, when the evidence is additional to other evidence on the same point, as distinguished from an ultimate fact, it is cumulative in the statutory sense. Now, as a defense in this case, the defendant attempted to show lewdness or adulterous conduct. On the trial already had, there was evidence of particular facts tending to show lewdness. Additional evidence as to such particular facts would be cumulative. But the showing of newly discovered evidence is that witnesses will testify to other facts from which the ultimate fact of lewdness may be found. The defendant purposes to prove acts not before

attempted to be established. Such evidence we do not regard as cumulative, within the rule for denying a party a new trial. *Able v. Frazier*, 43 Iowa, 176; *Parker v. Hardy*, 24 Pick. 246; *Stineman v. Beath*, 36 Iowa, 78; *Alger v. Merritt*, 16 Iowa, 121.

II. As to the assignment that the record does not show that due diligence was exercised to secure the evidence at the first trial, we think no error appears. The showing, in brief, is that the defendant before the trial made inquiry of a great many persons that he supposed knew, or would be likely to know, of the relations of said Boggess with women, or touching any of the matters in issue in said case, and in each and every instance pursued each and every line or hint of evidence with diligence, to the full extent of his ability, etc. The particular criticism upon the showing is that it does not show of whom inquiries were made, so as to leave the question of diligence one for the court, and not the affiant, and *Smith v. Wagaman*, 58 Iowa, 11, is cited. The cases are clearly distinguishable. In that case the showing was of the effort made to learn the name of particular persons who heard a certain conversation, and certain other persons were known to be present, an inquiry of whom would likely disclose the desired names, but the affidavit was only that inquiry was made to ascertain the names of the persons whom affiant remembered were present. From the record in that case the court could say: "There were certain persons of whom due diligence required that inquiry should have been made. The affidavit may be true, and the inquiries have been made of persons known or not supposed to have knowledge of the persons or their names." From such an affidavit the district court could well say it was not satisfied, or did not believe, that diligence had been exercised, as it, in effect, did, and this court affirmed its action. The affidavit in this

2. ——: ——: showing of diligence.

case is materially different, and one from which the district court could believe and find that due diligence had been exercised, and with such a finding we cannot interfere. The fact that the affidavit states conclusions, rather than particular facts from which the conclusions might be found, goes rather to the value of the affidavit as evidence than to its legality as such. The query is presented if it should not appear that counsel for the defendant did not know of this evidence. To hold that such a showing must be made would be equivalent to assuming such knowledge on the part of counsel, and we think that such a rule does not and should not prevail. Nothing in the record will justify our interference with the action of the court on the question of diligence.

III. Is it the law that, under a plea of justification in such a case, a new trial should not be granted?

8. ——: ——: action for slander: plea of justification.

There is a faint showing of authority to support the rule, but, in view of our statute, its value need not be discussed. Code, section 2837, treats of new trials, and provides "that * * * the verdict * * * shall be vacated, and a new trial granted, on the application of the party aggrieved, for the following causes, affecting materially the substantial rights of such party: * * * *First.* Newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial." No class of cases in which there is a verdict is excepted from the operation of the statute, and it seems to us conclusive of the question.

The defendant's appeal appears to be only to maintain the order for a new trial in case of a reversal on the plaintiff's appeal. It is not, therefore, necessary to consider questions therein presented. AFFIRMED.

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# ROCK ISLAND PLOW COMPANY, Appellant, v. BREESE & BREESE *et al.*, Appellees.

# J. L. ROBINSON, Appellant, v. THE SAME.

1. **Assignment for Benefit of Creditors**: PREFERENCES. An insolvent firm having determined to make a general assignment of its property for the benefit of its creditors, without preferences, employed an attorney to draw up a deed in accordance with that purpose, but before said deed was completed, and before the delivery thereof to the assignee, a creditor, learning of the purpose of the firm, caused an attachment to be levied upon the firm property; thereupon, the said debtors and their assignee, to obtain the release of the attached property, executed a mortgage thereon to the attaching creditor, *held*, that there being no evidence of collusion between said debtors and the attaching creditor in the levy of said attachment, nor of any intention on the part of the debtors to prefer any creditor when they determined to make an assignment, the said deed of assignment and mortgage were not parts of the same transaction, and, therefore, to be construed together as a general assignment with preferences.

2. ———: ———: ATTACHMENT: DEFECTIVE WRIT: AMENDMENT. Where a writ of attachment issued under the seal of the district court, by the clerk of that court, and upon a petition filed in said court, recited that the petition was filed in the circuit court, and directed the sheriff to make return to the circuit court, *held*, that such defects were amendable at any time upon objection being made thereto, and did not affect the validity of the levy.

3. ———: PRIOR LIENS: POWERS OF ASSIGNEE. The said attachment having been levied before the completion of the assignment, the assignee took the property under said deed subject to said lien, and it was competent for the assignors and assignee, for the purpose of getting the assigned property into the custody of the assignee, to execute a mortgage thereon to the attaching creditor.

*Appeal from Webster District Court.*—HON. S. M. WEAVER, Judge.

WEDNESDAY, OCTOBER 21, 1891.

ACTION in equity, in which the validity of a general assignment for the benefit of creditors, an attach-

ment levied upon certain personal property, and a chattel mortgage, are claimed to be void. There was a hearing upon the merits, and the plaintiffs' petitions were dismissed, and they appeal. The appeals in both cases will be determined in one opinion.—*Affirmed.*

*John Doud, Jr.*, and *R. M. Wright*, for appellant.

*Albert E. Clarke*, for appellees, A. Beach and Breese & Breese.

*A. N. Botsford* and *Healy & Healy*, for appellee, M. Healey.

ROTHROCK, J.—I. The defendant Breese & Breese was a copartnership composed of A. Breese and Cecil Breese. For some time prior to the twenty-fifth day of September, 1888, the said partnership had been engaged in the sale of agricultural implements. The firm was insolvent, and on said day the members thereof made a general assignment for the benefit of creditors to the defendant, A. Beach. The defendant, M. Healy, was a creditor of the firm, and on the same day he caused a writ of attachment to be levied upon the partnership property. After the writ of attachment was levied the partnership executed a chattel mortgage to Healy upon a part of the property, and by agreement the sheriff, who was in possession under the writ of attachment, released the property, and the assignee took possession, with the understanding that he took the property subject to the mortgage to Healy. The plaintiffs are creditors of the partnership of Breese & Breese, and recovered judgments (one of which was in an attachment suit) on their claims some time after the date of the assignment, attachment and chattel mortgage. They attempted to levy executions on the mortgaged property. The levy was resisted by Healy, and he

1. ASSIGNMENT for benefit of creditors: preferences.

removed and sold the mortgaged property by virtue of his mortgage. These actions were commenced by the plaintiffs, and they ask that the mortgage and assignment be set aside and held for naught, and the property and credits of the firm be applied in satisfaction of said judgments. The ground alleged for the relief sought is that the mortgage and assignment together amount to a general assignment for the benefit of creditors, with a preference to the defendant Healy, and are, therefore, void.

It is provided by section 2115 of the Code: "No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims." It is conceded that the partnership was insolvent, and that the assignment in question was contemplated by the members of the firm for several days before it was made. An attorney was consulted, who commenced writing up an assignment on the twenty-fourth day of September, 1888. On the morning of the next day the defendant Beach consented to act as assignee, and the instrument was completed on that day. Now, if, as part of the same transaction, and for the purpose of giving a preference to Healy, the partnership executed the mortgage to Healy, the assignment and mortgage would both be void, as being within the provision of the statute above cited. This question has so frequently been determined by this court that a reference to the cases is unnecessary.

The rights of the parties to these cases depend somewhat on other facts necessary to be considered in connection with the time of the execution of the mortgage and assignment. In the first place, when the members of the partnership determined to make an assignment they had no intention to prefer any creditor. When the instrument was written and the

writing completed it was an assignment for the benefit of all the creditors of the firm without any preference. There was no collusion between the members of the firm and Healy. They had no conference on the subject. Healy learned that the firm was making an assignment, and at once set himself about procuring an attachment. The attachment was delivered to the sheriff, who proceeded to the building where the goods were kept, and took possession by locking it up. There is some question made whether the acts of the sheriff amounted to a valid levy. But there is no doubt that under the evidence there was a lawful levy. This act was done before there was any attempt by the firm or the members thereof to turn over the possession of the property to the assignee. We have recited what we regard as the undisputed facts in the case. There are other facts upon which there is a dispute and a conflict of evidence, and it is necessary that we should determine just what the evidence establishes. We will do so without reviewing the testimony of the witnesses which has been elaborately discussed by counsel. A careful examination of this evidence in the light of the arguments of counsel has led us to the conclusion that the assignment was not completed until after the attachment was levied, but that it was in the possession of the attorney who drafted it, awaiting the signature of one of the members of the firm. It may be true that it was a valid instrument without the signature of both members of the partnership, but the signatures of both were thought to be necessary, and the parties acted in that belief, and there was no delivery of the assignment to the assignee as a completed instrument until some time after the attachment was served, and the property in the possession of the sheriff. When this was discovered by the members of the firm and by the assignee, a compromise was effected with Healy, by which he released the attachment, and

took the mortgage. The acts of the members of the firm and of the assignee amounted to a concession that the attachment was a valid lien upon the property. As we have said, there was no collusion between Healy and the insolvent debtors. They gave the mortgage because they believed it would be to the advantage of themselves and all the creditors to release the attachment. The final signature to the assignment and the signature to the mortgage were made at the same time.

II. It is claimed that the attachment was void because of certain defects in the writ. It is doubtful if that question can be raised in these actions. But suppose the defects complained of were upon the face of the paper when it was issued. This did not render the levy void. It is provided by section 3021 of the Code that "this chapter [the chapter on attachment] shall be liberally construed, and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the petition, affidavit, bond, writ or other proceeding, and no attachment shall be quashed, dismissed, or the property attached released, if the defect in any of the proceedings has or can be amended so as to show that a legal cause for the attachment existed at the time it was issued." The defects complained of were such as could have been amended. They consist in recitals in the writ that the petition was filed in the "circuit court," and an order to the sheriff to make return of his doings to the "circuit court." The fact is, the petition was filed in the district court, and the writ was under the seal of that court, and attested by the clerk of the court. The circuit court was abolished before that time. These defects were such as were amendable at any time that any objection should be made thereto. See *Murdough v. McPherrin*, 49 Iowa, 479, where it was held that, where a writ of attachment is issued under the seal of one

**2. ——: ——: attachment: defective writ: amendment.**

court while the action is pending in another, it is competent to amend the writ. And in *Atkins v. Womeldorf*, 53 Iowa, 150, it was held that, where the sum claimed by the plaintiff in the attachment proceeding was omitted from the writ, it was competent to amend the writ by inserting the proper sum therein. The defects in the writ in this case are of about the same consequence as the defects in the writs in the cited cases.

III. There is but one other question necessary to be considered. It is whether it was competent for the members of the partnership and Healy to preserve the lien acquired by Healy by executing and delivering the mortgage in question; in other words, did Healy, by taking the mortgage, divest himself of a lien on the property for his debt? If at the time the members of the partnership and their attorney commenced the work of preparing the assignment there had been an attachment or mortgage upon the property, obtained in good faith by a creditor, the rights of such creditor could not be affected by the assignment. The assignee would have taken the property subject to the lien. This is precisely what was done in this case. It is true, the attachment was levied upon the property on the same day that the assignment was completed, but in point of time it preceded the assignment. It was surely the right of the members of the partnership and the assignee to determine whether it was better to give the mortgage and take possession of the property, or to allow the sheriff to retain the custody under the attachment. There is nothing in the case which tends to show that such a change of the lien was any prejudice to any other creditor.

3. ——: prior lien: powers of assignee.

Finding, as we do, that the attachment was levied before the assignment was completed, and that it was competent for the parties to substitute the mortgage

lien for the lien by attachment, it is an end of the case. The decree of the district court will be AFFIRMED.

ROBINSON, J., took no part in the decision of this case.

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# ANNA E. MUNGER, Appellee, v. CITY OF WATERLOO, Appellant.

1. **Negligence:** MUNICIPAL CORPORATIONS: DEFECTIVE SIDEWALKS: NOTICE: PERSONAL INJURY. In an action against a city for damages on account of injuries sustained through stepping in a hole in the sidewalk, the plaintiff was inquired of as to what was the condition of the sidewalk between her house and the corner, that being the place where the accident occurred, and she was permitted to answer that the walk was rickety, and had a number of holes in it. *Held*, that the testimony was competent as showing the general defective condition of the walk, which should have been known to the officers of the city, and, if known and repaired, would have included the defect in question.

2. ———: ———: ———: EVIDENCE. The size of the hole into which the plaintiff stepped being in evidence, *held*, that evidence as to whether the hole was large enough lengthwise so that a person walking crosswise of the hole could have put his foot in it was properly excluded, as the question left the size of the foot entirely to inference.

3. ———: ———: ———: ———. Evidence of the condition of the walk in such case two months after the accident may be properly admitted when it is shown that the walk was in a like bad condition since long prior to the date of the injury.

4. ———: ———: ———: CONTRIBUTORY NEGLIGENCE: INSTRUCTIONS TO JURY. In its instruction with reference to the plaintiff's freedom from negligence, the court directed the jury to take into consideration "the defective condition of the walk at and prior to the time of the injury," as alleged in the plaintiff's petition, her knowledge thereof, and her ability to walk thereon. *Held*, that it not being the purpose of such instruction to inform the jury as to the defendant's negligence, but that of the plaintiff, the language was prejudicial when construed with the other instructions given.

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5. ———: ———: ———: INSTRUCTIONS TO JURY. The court having stated very minutely the facts upon which the plaintiff sought to recover, and instructed the jury that the plaintiff's recovery must depend upon such facts being sustained by the evidence, it was not erroneous to instruct the jury that if the walk had been "notoriously bad and out of repair," and if the city undertook to repair the "defective" walk, and left it in "an unsafe condition," it would be presumed to have known of its condition.

6. ———: ———: ———: ———. A reference in the instructions to the jury to the defect in the sidewalk as "the dangerous character of the walk," *held*, not to be deemed prejudicial, where, under the finding of the jury, the defect was of a dangerous character.

*Appeal from Black Hawk District Court.*—HON. JOHN J. NEY, Judge.

WEDNESDAY, OCTOBER 21, 1891.

ACTION for personal injury in a defective sidewalk. There was a judgment for the plaintiff, and the defendant appeals.—*Affirmed.*

*H. H. Bezold* and *O. C. Miller*, for appellant.

*Boies, Husted & Boies*, for appellee.

GRANGER, J.—I. It is about seventy-five feet from the plaintiff's house to a corner in the street, and the injury complained of was caused by stepping into a hole in the walk about half way from the house to the corner. As bearing on the question of the negligence of the city in failing to keep the walk in proper repair, and the facts of its notice of the condition of the walk where the injury occurred, the plaintiff was asked this question: "What was the condition of the walk between your house and the corner, the crossing of Seventh street, as to being broken places in it or not, or holes in them?" Against the objection of the defendant she answered: "The walk was rickety, and there was a number of holes in it." Error is

1. NEGLIGENCE: municipal corporations: defective sidewalks: notice: personal injury.

predicated on this action of the court, but it seems to us the testimony was proper, as tending to show a condition of the walk that should have been known by the proper officers, and, if known and diligently repaired, would have included the defect in question, and avoided the accident complained of. There seemed to be a general defective condition of the walk along that part of the block that passed unnoticed by the authorities, or, if noticed, without repair; and the hole where the plaintiff was injured was a part of the general defect. Practically the same question was considered in *McConnell v. City of Osage*, 80 Iowa, 293, and the authorities cited and discussed.

II. On the cross-examination of one Buttrick, he was asked if the hole in the walk where the plaintiff was injured was large enough lengthwise so that a person walking crosswise of the hole could have put his foot in it." The answer was excluded on objection, and not improperly so. The size of the hole was in evidence, and the jury could certainly as well determine if a person could put his foot in it as the witness, when the question left the size of the foot entirely to inference. The answer, we think, could have been of no particular value.

2. —: —: —: evidence.

III. The injury occurred to the plaintiff, January 10, 1888. One Flickinger was a witness for the plaintiff, and testified that he saw the walk in March, 1888. He was then asked as to its condition at that time, and against objections, because of the length of time after the injury, he was permitted to state that the walk was in bad condition, and to state the particulars as to its condition. Error is claimed because of this. The evidence was not improper from the fact that there was evidence tending to show that the walk was in a like bad condition since long prior to the date of the injury, and because of this

3. —: —: —: —:

the holding is not against the rule stated in *Hoyt v. City of Des Moines*, 76 Iowa, 430, or *Parkhill v. Town of Brighton*, 61 Iowa, 104. These cases rather give support to the ruling in this case.

IV. The fourth instruction given by the court is made the subject of an assignment, as follows: "4. In determining whether the plaintiff was guilty of a want of care in going upon the sidewalk, you will take into consideration the defective condition of the walk at and prior to the time of the injury, as alleged by her in her petition, and which allegation binds her on this branch of the case; her condition, including her pregnancy, and her agility or feebleness, owing to said condition or other cause; and her knowledge or want of knowledge of the walk; and all the circumstances of the case, as established by the evidence; and, if you believe, considering the knowledge that the plaintiff had of the walk, if any, her ability to walk upon this kind of a walk at the time, and the necessities of the case—that is, the need of her going upon the walk; whether she could, without unreasonable precaution, have taken another way, and thus avoided exposing herself to the danger of walking upon this walk in the condition it is alleged to have been in at the time. If a reasonably prudent person, in the exercise of ordinary care and caution, would not, in her condition, have attempted, with her knowledge of the walk, if any, to have gone upon the walk, then she is not entitled to recover."

4. —: —: —: contributory negligence: instructions to jury.

The criticism upon the instruction is that, "from its phraseology, the ordinary mind would at once come to the conclusion that the jury are instructed that the walk was defective as alleged in the petition, and the jury were to determine whether the plaintiff knew of such defects, and, if she did, then whether she acted prudently in walking over it." The criticism is without merit. It was not the purpose of this particular

instruction to inform the jury upon the law as to the defendant's negligence, but that of the plaintiff; and the reference in the instruction to the condition of the walk was but incidental to that purpose, and explaining to the jury that, even if the walk was out of repair, if negligent herself, she could not recover. Courts cannot ordinarily embrace the law of a case in a single instruction, and we have repeatedly said that the instructions must be considered together to know if error is involved. Other instructions given define the duties of a corporation in a proper maintenance of its walks, and properly direct the jury to an inquiry in that particular.

V. It is insisted that the sixth and ninth instructions are erroneous, and the complaint is in the following language: "Instead of pointing out to the jury the specific grounds of negligence which must be sustained by the evidence, the jury are instructed that, if the walk had been 'notoriously bad and out of repair,' and if the city undertook to repair the 'defective' walk, and left it in an 'unsafe condition,' then the city would be liable. These instructions should have specified the particular grounds of negligence which must be sustained by the evidence, and not have used the general terms, 'defective walk,' 'notoriously bad,' 'dangerous' for pedestrians and 'a reasonably safe walk.'" The court in the first paragraphs of its instructions very minutely states the facts upon which the plaintiff seeks to recover on the ground of negligence, and leaves no room for doubt that the recovery must be upon such facts, if at all, and it was not necessary, in the instructions referred to, to repeat them. The terms quoted from the instructions were used in explaining the conditions under which the city must or would be presumed to have known of the condition of the walk, and we think no juror could

5. ——: ——: ——: instructions to jury.

have failed to understand their purpose and bearing on the case.

VI. The twelfth instruction is as follows: "12. If the preponderance of the credible evidence in the case satisfies you that the plaintiff was free from any want of due care or attention that contributed to cause the injury, and further satisfies you that the city was guilty of negligence that was the proximate or near cause of the injury, and liable, through having notice through its proper officer or officers, and not repairing or removing the dangerous character of the walk after a reasonable time elapsed after such notice, then you will allow her such damages as will fully compensate her for her injury, including her suffering, mental and bodily pain, doctors' bills, nursing and loss of time, as shown by the evidence in the case." Complaint is made because of the words "dangerous character" used in the instruction. The plaintiff was injured on the walk because of a defect therein, and the words, "dangerous character of the walk," have no other meaning than the defective condition of the walk. The defect in the walk was, under the findings of the jury, of a dangerous character. There was no prejudice in the use of the words in the instruction.

VII. At the time of the injury the walk was in an icy condition, because of which, with other facts shown by the evidence, the appellant insists that a new trial should be granted. It is not a case for our interference. The evidence and the facts make it very properly a case in which the verdict of the jury, in the absence of error by the court, should be conclusive. The judgment is AFFIRMED.

# ALICE C. LEE *et al.*, Appellants, v. DAVID R. LEE, Appellee.

1. **Landlord and Tenant:** ALTERATION OF LEASE BY LESSEE. Where a lease of lands is made to commence at a future date by one already in possession thereof, the subsequent alteration by the lessee of certain dates in said lease, referring to the time when the lease was made, will not affect the lessee's right to the possession of said premises.

2. ———: AUTHORITY TO LEASE: ESTOPPEL. One who, as agent, has leased lands to another for a term of years, will not be heard upon his subsequently acquiring title to the demised premises to claim that said lease was made without authority, and that such fact was known to the lessee.

3. ———: LEASE: EVIDENCE. The lease in question purporting on its face to have been made on Monday, and no issue being raised as to the day on which the same was entered into, the court properly excluded evidence to show that it was made on Sunday.

4. ———: ACTION FOR POSSESSION OF LEASED PREMISES. Where one has come rightfully into the possession of leased premises, an action will not lie against him to recover possession until his right of possession has been terminated in the manner provided by law.

*Appeal from Hardin District Court.*—HON. J. L. STEVENS, Judge.

WEDNESDAY, OCTOBER 21, 1891.

THE plaintiffs claim that the defendant wrongfully holds possession of a certain tract of land. The defendant claims to hold the premises by virtue of a lease made by the plaintiffs. There was a trial by the court without the intervention of a jury, and a judgment in favor of the defendant for costs. The plaintiffs appeal.—*Affirmed.*

*J. H. Scales*, for appellants.

No appearance for appellee.

ROBINSON, J.—In September, 1888, the plaintiffs made to the defendant a lease in writing for the premises in controversy for the term of five years, to commence on the first day of March, 1889. At that time the premises were owned by a Mrs. Humphreys, but in October, 1888, she conveyed them to the plaintiffs. When the lease was made the defendant was living on the premises, and has occupied them since that time. The plaintiffs claim that the lease has been materially altered by the defendant since it was made, and that they had no authority to make it for a term longer than one year.

I. The alleged alterations consist principally of changes in certain dates which refer to the time when the lease was made, and, if the claim of the plaintiffs in regard to them were true, they would not affect the right of the defendant to occupy the premises. That right was given by the lease as originally made, and has not been abandoned.

1. LANDLORD and tenant: alteration of lease by lessee.

II. The plaintiffs complain of the rulings of the court in excluding evidence which tended to show that the defendant knew when the lease was made that the plaintiffs had no authority to make it for a longer term than one year. The rulings in question were correct. The evidence offered was incompetent to defeat the lease, and the plaintiffs cannot be heard to deny their authority to make it, especially as they afterwards acquired, and now hold, the absolute title to the leased premises.

2. ——: authority to lease: estoppel.

III. Complaint is made of the ruling of the court in excluding evidence to show that the lease was made on Sunday. It purported to be made on Monday, and no issue was raised by the

3. ——: lease: evidence.

pleadings as to the actual date of execution. The evidence in question was, therefore, properly excluded.

IV. The plaintiffs could not in any event have succeeded in this action, for the reason that they do not ask any relief in their pleadings. But, conceding that it is an action for the recovery of real estate, they must fail. On their own showing the defendant was in possession of the premises when the lease was made, and we must presume that his possession was lawful. No sufficient notice to terminate the tenancy is shown. The petition alleges that a notice, as required by the statute, was served upon the defendant, and there is some evidence which tends to show that a notice was served, but the date of service is not shown. The allegations of notice in the petition are denied by the answer. We find a paper printed in the record entitled, a "Notice to Quit," and the statement, "Duly served March 14, 1890," printed below it, but it is not set out as an exhibit attached to a pleading; it is not set out as a part of the evidence, nor is it identified in any manner by the evidence submitted; and it is not shown when this action was commenced. Therefore, if it were true that the lease in question is void, the plaintiffs could not recover, because it is not shown that the right of possession of the defendant has been terminated in the manner required by law. We find no ground for reversing the judgment of the district court. It is, therefore, AFFIRMED.

4. —: action for possession of leased premises.

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## SANDWICH MANUFACTURING COMPANY, Appellant, v. T. J. B. ROBINSON, Intervener, Appellee.

1. **Chattel Mortgage:** MONEY DEMANDS NOT YET EARNED. Demands for money not yet earned may be mortgaged.

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2. ———: ———: SUFFICIENCY OF DESCRIPTION. A mortgage upon all threshing machine accounts, which the mortgagor shall earn or shall become due him by the work of a certain machine therein described, and in the mortgagor's possession, from the date of said mortgage until the mortgage indebtedness is paid in full, is too indefinite in its description to charge third persons with notice. [BECK, C. J., *dissenting.*]

*Appeal from Franklin District Court.*—HON. D. R. HINDMAN, Judge.

WEDNESDAY, OCTOBER 21, 1891.

THE plaintiff caused an execution to be issued for the satisfaction of a judgment which it held against one Frank Menzie. It was served by garnishing certain persons as supposed creditors of Menzie. They were required to appear in court and make answer to the garnishment. At the term at which they were required to answer the appellee appeared and filed a petition of intervention, in which he claimed the money of Menzie in the hands of the garnishees by virtue of a chattel mortgage thereon, executed and recorded in Franklin county prior to the garnishment. A demurrer to the petition of intervention was overruled, and from that ruling the plaintiff appeals.—*Reversed.*

*Andrews & Bedell*, for appellant.

*Wm. Hoy*, for appellee.

ROBINSON, J.—I. The matter in controversy is presented in a certificate of the trial judge in words as follows: "* * * Is the following description contained in a chattel mortgage a sufficient description to impart notice to third parties as to the accounts therein described, to-wit: 'One J. I. Case Threshing Machine Co.'s separator, number 10,921, with trucks, etc., and twelve-horse power, complete, with all the belts and tools owned by Menzie & Norvell. All the threshing-

1. CHATTEL MORTGAGE: money demands not yet earned.

machine accounts which we shall earn or shall become due us by the work of the above machine from now till this debt is paid in full. All of which property I now own, clear of all incumbrance, and the same is now in my possession in section 11–8, township number 91–2, range number 21?'"

It is claimed by the appellant that the description is insufficient for the reason that demands for money not earned cannot be mortgaged. We do not think the claim is well founded. As a general rule, every species of personal property which may be sold, and which has an actual or prospective existence, may be mortgaged. 6 Lawson on Rights, Remedies & Practice, sec. 3079. It is the well-settled rule in this state that a valid mortgage may be given on personal property not owned by the mortgagor, and not then in existence, if he afterwards acquire it. That rule has been applied to additions to stocks of merchandise. *Scharfenburg v. Bishop*, 35 Iowa, 63; *Stephens v. Pence*, 56 Iowa, 258. It has also been applied to crops to be planted and grown. *Norris v. Hix*, 74 Iowa, 525; *Wheeler v. Becker*, 68 Iowa, 723; *Fejavary v. Broesch*, 52 Iowa, 88. The right of a railroad company to mortgage its future earnings was affirmed in *Jessup v. Bridge*, 11 Iowa, 575, although the decision was founded to some extent on considerations of public policy. See also *Dinham v. Isett*, 15 Iowa, 293. The principles which govern the cases cited are applicable to the one under consideration. That an account for money due may be sold, cannot be questioned, and an interest in such an account less than the unqualified ownership of it may be transferred. Since a valid mortgage may be given on merchandise not in existence, and on crops neither grown nor planted, we must hold that one may be given on a claim for money not earned. In such cases the mortgage attaches to the property designed to be included therein when it is

brought into existence. What relation a mortgage of accounts has to the recording act is a question not presented for our consideration, and not determined.

II. We are of the opinion, however, that the question certified must be answered in the negative. The description given specifies the machine with which the accounts were to be earned, and the time during which they were to be earned, but there is no suggestion as to the county or state in which they were to be earned, nor of the persons against whom they may accrue, and no certainty as to the persons who shall earn them by operating the machine. The test of the sufficiency of a description in a chattel mortgage to charge third parties with notice approved by this court is stated as follows: "That description which will enable third persons aided by inquiries which the instrument itself indicates and directs, to identify the property, is sufficient." *Smith v. McLean*, 24 Iowa, 332. It was said in *Muir v. Blake*, 57 Iowa, 665, that a chattel mortgage which described the mortgaged property as "all the crops raised by me in any part of Jones county for the term of three years," was insufficient, and that "a chattel mortgage ought not to be a drag net, covering a whole county, in any such general terms." But the description involved in that case was much more definite and certain than the one in controversy. This contains nothing which would direct third persons to the property sought to be mortgaged. It is true, if a debtor of the mortgagor were found, he might be interrogated as to the origin of the indebtedness, and by pursuing that or some other method it might be ascertained that the debt was owing to the mortgagor by reason of work done with a separator bearing the number given in the mortgage, but the law imposes no such burden upon third persons. They are under no obligation to exhaust every possible means of information before

2. ——: ——: sufficiency of description.

they can safely proceed to treat the property of the mortgagor as unincumbered. *Sperry v. Clarke*, 76 Iowa, 506; *Barrett v. Fisch*, 76 Iowa, 553, and cases therein cited; *Warner v. Wilson*, 73 Iowa, 719.

Other questions are discussed by counsel, but are not involved in the appeal, and cannot be decided. For the reasons indicated the order of the district court is REVERSED.

BECK, C. J. (*dissenting*).—In my opinion the description of the accounts covered by the mortgage is just as definite as it could possibly have been made. It describes and specifies the machine for the services of which the mortgaged accounts should accrue, and the time in which such debts should be incurred. Who the persons owing the accounts shall be, and where they live, and, therefore, where the locality of the account mortgaged shall be, could not have been known, and, therefore, could not have been stated. The opinion defeats the right of the holder of the mortgage upon a ground which could not have been provided against. The mortgage puts upon inquiry which may be readily answered as to the facts relating to the names of the persons who shall own the accounts, and the locality thereof, for the accounts are against those who have threshing done by the machine. All accounts for such services are covered by the mortgage. In my opinion, the judgment of the district court should be affirmed.

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## CLARK FAIRFIELD, Appellee, v. J. W. PHILLIPS, Appellant.

**Partnership**: FIRM PROPERTY: CONVERSION: EVIDENCE. Where certain shares of corporate stock were transferred in equal quantities to each of the members of a firm, but payment therefor was made with bonds

owned by the firm, the negotiations therefor concurred in by both parties, the expense of acquiring it borne by the parties equally, and the purchase was at the time and afterwards recognized as a partnership transaction, *held*, that the stock must be regarded as partnership property, and that one of the partners having traded the shares transferred in his name for certain real estate, and converted the same to his own use, he was liable to his copartner for one-half the value thereof, as well as of the rents and profits.

*Appeal from Butler District Court.*—HON. J. C. SHERWIN, Judge.

WEDNESDAY, OCTOBER 21, 1891.

ACTION in chancery to settle certain copartnerships existing between the parties under three separate contracts,—one for the transaction of a general retail lumber, grain, coal and produce business; another for the transaction of a banking business; and the third for the purchase of mining stock. The business under the first two contracts was settled by the parties before trial, leaving the case depending for trial as to the third contract. A decree was entered for the plaintiff. The defendant appeals.—*Affirmed.*

*Hemenway & Grundy* and *Boies, Husted & Boies*, for appellant.

*Gibson & Dawson*, for appellee.

BECK, C. J.—I. The parties, as a copartnership, bought certain mining stock, which was transferred in equal quantities to each separately. The stock in the name of the defendant he transferred, receiving therefor, after two or three transactions to secure payment, a farm, which was conveyed to him individually. He subsequently executed a mortgage upon the farm to secure an indebtedness of his own. The plaintiff insists that the mining stock was partnership property, and that, as the defendant had sold it, and appropriated to

his own use the proceeds of the sale, he is liable to the plaintiff for half the value of the farm. The defendant maintains that the purchase of the stock was not a partnership transaction, but was made upon the separate individual accounts of the parties.

II. The only question in the case is this: Was the stock partnership property? We are of the opinion that the evidence clearly establishes that it was. The following, among other facts, support our conclusion: The stock was purchased with partnership bonds, and the expense of acquiring it was borne by the parties equally. The negotiations were conducted or concurred in by both of the parties, and the purchase was at the time and afterwards recognized as a partnership transaction; indeed, it never seems to have been represented by the defendant as an individual transaction until after the suit was commenced. The certificates of stock of both parties were held by the defendant, who seems to have been the custodian of the bonds and papers of the firm. Other facts pointing to the same conclusion could be mentioned, but the foregoing are sufficient to uphold our conclusion. The stock was transferred to the parties individually, in equal quantities, in order to entitle the plaintiff to become a stockholder, as at the time that was thought necessary. It was not so transferred for the reason that it was separately owned by the parties. There was no claim or understanding at the time that it was so owned. The defendant, by taking the title of the farm in his own name, and incumbering it on his own account for a large part of its value, appropriated it to his own use, and is liable to the plaintiff for one-half of its value and one-half of the rents and profits received therefrom, after deducting disbursements for expenses connected with the farm and improvements made thereon. The decree of the district court is to this effect. It is, therefore,

AFFIRMED.

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# BLOTCKY BROS., Appellees, v. JAMES O'NEILL, Sheriff, Appellant.

1. **Attachment:** LEVY ON MORTGAGED CHATTELS: TENDER TO MORTGAGEE. A tender to the mortgagee of the amount due under a chattel mortgage, or the deposit of such sum with the clerk of the district court, by an attachment or execution creditor after the levy of his attachment or execution upon the mortgaged chattels, will not make such levy valid.

2. ———: ———: ———: RIGHT OF POSSESSION. After acquiring title to a chattel mortgage the plaintiffs caused execution to issue upon a judgment held by them against the mortgagor, and had the same levied upon the mortgaged property. Afterwards they served notice of their ownership of said property under said mortgage, and demanded the possession thereof, and its release from levies of execution and attachment in favor of certain other creditors of the mortgagor. *Held*, that the plaintiffs were entitled to the possession of said property by virtue of said mortgage, but that their demand upon the sheriff for possession operated as an abandonment of their levy upon the property under said execution, and left the property freed from all the writs in the sheriff's hands.

*Appeal from Pottawattamie District Court.*—HON. H. E. DEEMER, Judge.

WEDNESDAY, OCTOBER 21, 1891.

ACTION to recover possession of a certain stock of merchandise. There was a trial to the court, resulting in a judgment for the plaintiffs. The defendant appeals. *Affirmed.*

*Flickinger Bros.*, for appellant.

*Shea & Calvin*, for appellees.

GIVEN, J.—This action was commenced March 9, 1889, and the questions involved are the sufficiency of the notices of ownership served by the plaintiffs upon the defendant, and whether the plaintiffs were entitled

to the immediate possession of the stock of merchandise in controversy at the time of the commencement of this action. The facts material to the determination of these questions are as follows: On the eleventh day of January, 1889, one M. Seipel, being the owner and in possession of the stock of merchandise, executed and delivered to the bank of Neola a chattel mortgage on said stock, which was duly recorded on the same day. On the following day, J. R. Sneider, a creditor of Seipel, caused a writ of attachment to be levied on said stock; and on the same day McCord, Brady & Co. and the Kilpatrick-Koch Dry-Goods Company, also creditors of Seipel, caused executions upon judgments that day rendered in their favor against Seipel to be levied upon the same property. These writs were all placed in the hands of the defendant as sheriff, and levied by him. On the sixteenth day of January following, between eleven and 11:30 o'clock in the forenoon, Henry W. Price, also a creditor of Seipel, tendered and paid to Walter I. Smith, attorney for the bank of Neola, at Council Bluffs, the amount due on said mortgage, and took an assignment of the same, as provided for in chapter 117, Acts of the Twenty-First General Assembly, Smith being theretofore authorized by the bank to accept such a tender. In the afternoon of the same day, and after tender to Smith had been accepted and the assignment made, a tender was made at Neola to the cashier of the bank for the benefit of Sneider, McCord, Brady & Co. and Kilpatrick-Koch Dry-Goods Company, which tender was refused upon the grounds that the bank did not then have the mortgage at Neola. On January 17, 1889, Price assigned the mortgage to the plaintiffs under said chapter 117, and on the same day Price and the plaintiffs each obtained judgment against Seipel, and caused executions to issue thereon, which were placed in the hands of the defendant as sheriff, and by him levied upon the stock of merchan-

dise subject to the three former levies. Price assigned his judgment to the plaintiffs. On the eighth day of March, 1889, the plaintiffs served three notices of ownership upon the defendant, which will be hereafter more particularly noticed, and on the following day, March 9, 1889, commenced this action. On July 20, 1889, after judgment was pronounced in favor of the plaintiffs, and finding that their interest in the property was two hundred and ten dollars, defendant moved the court to require the plaintiffs to accept the tender and costs, on deposit in the court in satisfaction of their interest in the property, to which motion was attached a certificate of the clerk that the defendant had deposited in his hands, for the plaintiffs, two hundred and twenty-five dollars. This motion was overruled, to which the defendant excepted.

I. There is no dispute as to any material facts, and they are substantially as we have stated. The gist of the action is as to the plaintiffs' right to the immediate possession of the property at the time this action was commenced, March 9, 1889. That right must be determined by the facts as they then existed, and cannot be established or defeated by subsequent acts. The errors assigned involve substantially the merits of the case, which are whether the plaintiffs, as attaching creditors under the assignment of the mortgage, were entitled to the possession, or whether the defendant sheriff, under the writs in his hands, and the levies thereof, was entitled to the possession. Both parties rest their claim to possession upon the provisions of chapter 117, Acts of the Twenty-first General Assembly. Prior to that enactment mortgaged property was protected from seizure or lien by attachment or execution, and the only process by which a creditor of the mortgagor could subject any surplus in the hands of the mortgagee was by garnishment. By garnishment he

1. ATTACHMENT: levy on mortgaged chattels: tender to mortgagee.

acquired no right against the property, but only against the garnishee individually to the extent of the surplus. *Buck-Reiner Co. v. Beatty*, 82 Iowa, 353. It is also held in that case that the remedy provided in chapter 117 is not to the exclusion of the right by garnishment. Section 1, chapter 117, provides "that personal property not exempt from execution, hereafter mortgaged, or heretofore mortgaged, when the debt secured thereby is due, may be taken on attachment or execution issued at the suit of a creditor of a mortgagor; but before the property is so taken the officer or plaintiff must pay or tender to the holder of the mortgage the amount of the mortgage debt and interest accrued, or must deposit the amount thereof with the clerk of the district court of the county wherein the mortgaged property is found, payable to the order of the holder of the mortgage; * * * and when such sums are tendered to the holder of the mortgage, or deposited with the clerk, the attaching creditor shall be subrogated to all the rights of the holder of the mortgage; and the proceeds from the sale of the mortgaged property shall go first to the discharge of such indebtedness and costs of execution; provided, however, that if the judgment debtor shall pay the debt for which the attachment or execution was issued the property shall be released, and the creditors shall be entitled to receive money deposited to pay the mortgage debt, and shall have no right or interest in the mortgage, or in the mortgaged property." While the question is as to the plaintiffs' right of possession, the right of the defendant is discussed as counter thereto, and as showing that the plaintiffs were not entitled to possession.

The defendant, as sheriff, had levied an attachment in favor of Sneider, and executions in favor of McCord, Brady & Co. and Kilpatrick-Koch Dry-goods Company, on the mortgaged property. This property was

not subject to such levies, only as provided in said chapter 117. The tender made by these creditors to the Bank of Neola was not made until after the attorney for the bank had accepted the tender from Price, and made a complete assignment of the mortgage to him. Price had been subrogated to all the rights of the bank before this tender, and these creditors acquired no rights by their offer to the bank. Neither did their subsequent deposit of two hundred and twenty-five dollars with the clerk affect the question of the right of possession on March 9. These creditors had no right to take the property on attachment or execution, because they had not previously paid or tendered to the holder of the mortgage, nor deposited with the clerk, the amount of the mortgage debt. The bank had ceased to be the holder of the mortgage before their tender to it, and their deposit with the clerk was long after their levies, and after the commencement of this action, if not after its submission. It follows from these views that the levy of the attachment and executions in favor of Sneider and of McCord, Brady & Co. and Kilpatrick-Koch Dry-Goods Company were unauthorized, and gave the defendant no right to the possession of the mortgaged property.

II. There can be no question but that, by the assignment of the mortgage to them, the plaintiffs were subrogated to all the rights of the holders of the mortgage, and as such were entitled to possession of the mortgaged property until some other creditor of the mortgagor became subrogated to that right by complying with the requirements of chapter 117. It is true that at the time of the service of the notices of ownership, and at the commencement of this action the defendant, as sheriff, held two executions in favor of the plaintiffs, which he had levied upon the mortgaged property. It is also true that the property had not been released therefrom

2. ——: ——: ——: right of possession.

by payment of the debts by Seipel, nor did the plaintiffs in express terms release their executions. They did notify the defendant sheriff of their interest in the property, how they had acquired such interest, and for what consideration, and that the property belonged to them, and demanded a release of it from the levies in favor of Sneider, McCord, Brady & Co. and Kilpatrick-Koch Dry-Goods Company. While the motion did not in terms demand or order a release from the plaintiffs' levies it would hardly be contended that in the face of such notices the sheriff would be liable to the plaintiffs for surrendering the property to them on their demand, and for not continuing to hold it under the executions in their favor. At and before the commencement of this action the plaintiffs stood as the holders of the mortgage. None of the other creditors had acquired any interest therein under chapter 117, or otherwise. The claim to immediate possession by the plaintiffs was in fact an abandonment or release of their levies upon the property, and, therefore, left the property freed from all the writs in the defendants' hands.

We reach the conclusion that the court did not err in either of the respects assigned as errors, and that the findings and judgment should be AFFIRMED.

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## R. W. COLE, Appellant, v. J. E. SMITH, Appellee.

**Attachment:** WRIT WRONGFULLY ISSUED: DAMAGES: DELIVERY BOND: RELEASE OF PROPERTY AFTER VERDICT. Where in an action aided by attachment a levy was made upon certain personal property, for the release of which the defendant gave a delivery bond conditioned for the delivery of said property, or its estimated value, to satisfy any judgment that might be rendered against the defendant in said action,

and upon the trial of said cause the jury found specially that the defendant was entitled to recover upon his counterclaim for damages for the wrongful suing out of said attachment in a sum named, but returned a general verdict in favor of the plaintiff for the amount of his claim less the amount of damages found for the defendant, *held* that the plaintiff was entitled to have the attached property subjected to the payment of his judgment, and that its release by the court upon the motion of the defendant upon the ground that the attachment had been wrongfully sued out was erroneous.

*Appeal from Lyon District Court.*—HON. GEORGE W. WAKEFIELD, Judge.

THURSDAY, OCTOBER 22, 1891.

THIS is an appeal by the plaintiff from an order dissolving an attachment, and releasing certain attached property. The facts appear in the opinion.—*Reversed.*

*E. C. Roach* and *Van Wagenan & McMillan*, for appellant.

*J. M. Parsons* and *P. C. Shannon*, for appellee.

ROTHROCK, J.—The action is at law to recover the sum of five hundred and sixty dollars for certain cord-wood sold by the plaintiff to the defendant. An attachment was issued upon the alleged ground that the defendant was about to dispose of his property with intent to defraud his creditors. The defendant answered by admitting the purchase of the wood, but alleging that the indebtedness therefor had been paid. He also set up a counterclaim, in which he averred that the attachment was wrongfully and maliciously sued out, and demanded a judgment against the plaintiff for actual and exemplary damages. There was a trial by jury, and a verdict in which it was found specially that the defense of payment was not established by the evidence, and that the defendant was entitled to actual damages upon his counterclaim in the sum of

one hundred and ten dollars, but that he was not entitled to exemplary damages. A general verdict was also returned, in which it was found that the plaintiff was entitled to recover the sum of four hundred and sixty-six dollars and eleven cents, which was the balance due the plaintiff for the wood after deducting the damages allowed the defendant on the counterclaim. When the attachment was sued out it was levied on certain personal property of the defendant. In a few days after the levy of the writ of attachment the defendant gave the sheriff a delivery bond, and the attached property was released and delivered to the defendant. The condition of the bond is in these words: "Now, therefore, if the said J. E. Smith shall deliver said property, or its estimated value, as aforesaid, to said sheriff, to satisfy any judgment that may be rendered against said defendant in said suit within twenty days after the rendition thereof, then this obligation to be void, otherwise to remain in full force and virtue." Upon the return of the verdict of the jury the defendant filed a motion in these words: "Now comes the defendant and shows the court that the jury have found that the attachment in this case was wrongfully sued out. He, therefore, moves the court to discharge the attached property." The motion was sustained, and an order made dissolving the attachment and discharging the attached property. The correctness of this order is the only question presented by the appeal.

It will be observed that by deducting the damages found for the defendant from the amount found for the plaintiff all the damages of every kind to which the defendant is entitled are fully satisfied and paid. The plaintiff has paid the penalty for his wrongful act in seizing the property. The question is, must he not only pay the damages, but must he release his claim upon the property for the satisfaction of his judgment? The remedy by attachment is purely statutory, and the

question must be determined under the provisions of the attachment law of this state. The condition of the delivery bond given by the defendant in this case is in compliance with section 2996 of the Code, which requires an undertaking that the "property, or its estimated value, shall be delivered to the sheriff to satisfy any judgment which may be obtained against the defendant in that suit." Section 2998 provides that it "shall be a sufficient defense that the property, for the delivery of which the bond is given, did not belong to the defendant, against whom the attachment was issued, or was exempt from seizure under such attachment." These are the defenses which the law designates. There is no other provision of the statute in any manner limiting the absolute requirement of section 2996 that the property, or its value, shall be delivered to the sheriff to satisfy any judgment which may be obtained in the action. This right of the plaintiff to resort to the bond in payment of his judgment is not made dependent on the amount of the judgment. It is true that under section 3018 a motion may be made to discharge the attachment at any time before trial for insufficiency of statement of cause thereof, or other cause apparent of record. But that section is not applicable to the question under consideration. This motion comes after trial, and is not an attack upon the record for any informality of statement or the like. It is an objection to maintaining the attachment made after a trial, and when there remains nothing to be done but pronounce judgment. Section 3017 provides that the defendant cannot contest the fact stated as a cause of action by a mere defense, but that his "remedy shall be on the bond; but he may, in his discretion, sue thereon by way of counterclaim, and in such case shall recover damages as in an original action on such bond." Here there is no provision for the discharge of the attached property after a recovery on the counter-

claim. If such had been the intent of the legislature, there surely would have been a provision enacted here or elsewhere limiting the liability on the bond required by section 2996. There is no such provision, but, on the contrary, the whole scope and spirit of the attachment law appear to deny any dissolution of the attachment after a trial and a finding that the plaintiff is entitled to judgment. It appears to us that upon the return of the verdict it was the duty of the court to render judgment for the plaintiff. When such judgment is rendered, the law requires that it shall be satisfied by the sale of the attached property, or by an application of its proceeds. Code, sec. 3011. The only authority for discharging the attachment after trial is that found in section 3015, which provides that the attachment shall be discharged "if judgment in the action is rendered for the defendant." There is no authority for discharging it where the trial results in a finding and judgment for the plaintiff.

We have thus disposed of this question without reference to cases in other jurisdictions. We must abide by what appears to us to be the meaning and intent of our own statute. REVERSED.

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## R. A. CAMPBELL, Appellant, v. LEWIS BROS. & MENZER, Appellees.

**Appeal from Justice's Court:** AMOUNT IN CONTROVERSY: COUNTERCLAIM: JURISDICTION. Where an action was brought before a justice of the peace to recover five dollars and fifty cents, and the defendant filed a counterclaim praying judgment against the plaintiff in the sum of fifty dollars, to which the plaintiff filed a general denial, and the case resulted in judgment for the plaintiff in the sum of four dollars and ninety cents, from which the defendant appealed, *held*, that if, in the judgment of the district court, the counterclaim

showed upon its face that the defendants were not entitled to the relief demanded, a motion by the plaintiff to dismiss the appeal because the controversy involved a sum less than twenty-five dollars should have been sustained.

*Appeal from Adair District Court.*—HON. J. H. HENDERSON, Judge.

THURSDAY, OCTOBER 22, 1891.

ACTION commenced before a justice of the peace upon an account for five dollars and fifty cents. The defendants pleaded a counterclaim of fifty dollars for malicious prosecution of the action. There was a judgment for the plaintiff for four dollars and ninety cents, and the defendants appeal to the district court. The plaintiff moved to dismiss the appeal on the ground that the account in controversy does not exceed twenty-five dollars. The motion was overruled, and the plaintiff appeals.—*Reversed.*

*Grass & Story*, for appellant.

*Gow & Hager*, for appellees.

BECK, C. J.—I. As the amount in controversy does not exceed one hundred dollars, the questions to be decided by this court are to be discovered in the certificate of the district judge, authorizing the appeal, which is in this language:

"I, J. H. HENDERSON, judge of the district court of the fifth judicial district of Iowa, now holding court in and for Adair county, Iowa, do hereby certify that this case involves a question of law upon which it is desirable to have the opinion of the supreme court, viz.: Should plaintiff's motion to dismiss the appeal in said cause, for the reason that the pleadings show that the amount in controversy does not exceed twenty-five dollars, have been overruled when the plaintiff sues for

five dollars and fifty cents, and the defendants answer with a general denial, and also file a counterclaim, praying for judgment against the plaintiff in the sum of fifty dollars, to which the plaintiff filed a reply in general denial of counterclaim. Trial was had, and judgment rendered for plaintiff in the sum of four dollars and ninety cents, when the counterclaim shows on its face, in the judgment of the district court, that the defendants were not entitled to the relief demanded, for the reason that said counterclaim did not state any cause of action upon which the defendants could recover."

Attention to this certificate enables us to discover that the only question certified for our decision involves the correctness of the court's ruling in the overruling of the motion to dismiss the appeal. The certificate immediately following the statement of the question states the facts and conclusions of law upon which the ruling was made; but it presents and certifies no question as to these facts and conclusions for our determination. It states that the counterclaim shows on its face that the defendants were not entitled to the relief claimed, but it presents no question of facts or of law involving the correctness of this statement. It is stated as a conclusion of law and facts that the counterclaim does not state any cause of action, but no question is certified to us for decision involving the correctness of this conclusion. We have no jurisdiction to consider such questions. *Vreeland v. Ellsworth*, 71 Iowa, 347. The question certified for decision to this court is this: Was the plaintiff's motion to dismiss the appeal for the reason that the pleadings show that the amount in controversy does not exceed twenty-five dollars rightly overruled? But it is coupled with a decision by the court, upon which no question is certified to us, to the effect that the counterclaim did state no cause of action. Upon this decision the question certified rests, and, as

there is no question of law certified thereon, it is to be regarded for the purpose of the case as correct. As the counterclaim is to be regarded as presenting no cause of action, it presents no claim for recovery. It, therefore, raises no controversy as to any amount, and fails to show that an amount exceeding twenty-five dollars is in controversy in the case. An appeal, therefore, is not authorized by law, and the district court should have sustained the plaintiff's motion to dismiss it.

The judgment of the district court is REVERSED.

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## GEO. D. ROSS, Appellee, v. HAWKEYE INSURANCE COMPANY, Appellant.

**Insurance: PREMIUM: PAYMENT: NOTICE OF SUSPENSION OF POLICY: SERVICE BY MAIL.** Under section 2 of chapter 210 of the Laws of 1880, providing that, where the time for the payment of the premium upon a policy of insurance is fixed by note or other contract, the insurance company may, within thirty days before, or at any time after, the maturity of such obligation, serve the defendant with notice in writing that unless the same is paid within thirty days his policy will be suspended; and providing, further, that such notice may be served personally or by registered letter, addressed to the assured at his postoffice address, the service of such notice by mail is completed when the letter is properly addressed to the insured, and registered at the postoffice..

*Appeal from Shelby District Court.*—HON. N. W. MACY, Judge.

THURSDAY, OCTOBER 22, 1891.

ACTION on a policy of insurance. There was a judgment for the plaintiff, and the defendant appeals. *Reversed.*

*George R. Sanderson*, for appellant.

*Smith & Cullison*, for appellee.

Granger, J.—I. It is urged that the assignments of errors are insufficient, and should not be considered. One assignment fairly presents the question of the correctness of each instruction given by the court, and is sufficient.

The plaintiff was the holder of a policy of insurance against loss by fire, issued by the defendant company. The time of insurance, by the terms of the policy, began April 18, 1889, and terminated April 18, 1890. The property insured was destroyed by fire July 2, 1889. The premium for the insurance was settled by note due July 1, 1889, and was unpaid at the date of the fire. The policy contains the following provision: *Fifth.* "That no insurance, whether original or continued, shall be binding until the actual payment of the premium, either in cash or note given therefor. Where a note or notes have been received, in whole or in part, for the premium named in this policy, or renewal of the same, and the assured or his assigns fail to pay the same, or any installment, or any part thereof, at the time or times specified in such note or notes, such failure shall immediately terminate all liability of this company under this policy, and the company shall not in any case be liable for any loss or damage that may occur at a time when any such note or notes, or any installment therein, or any part thereof, shall be overdue and unpaid." Chapter 210, Laws of 1880, provides: "Sec. 2. Within thirty days prior to, or at any time after the maturity of any note or contract, whether assessable, or where the time of payment is fixed in the contract, given for the premium on any policy of insurance, such company or association may serve a notice in writing upon the insured that his note, or an

installment thereof, is due, or to become due, stating the amount which will be due on the note or contract, and also the amount required to pay the customary short rates, including the expense of taking the risk, up to the time the policy will be suspended under the notice in order to cancel the policy, and that, unless payment is made within thirty days, his policy will be suspended. Such notice may be served, either personally or by registered letter, addressed to the assured at his post-office address, named in or on the policy, and no policy of insurance shall be suspended for non-payment of such amount until thirty days after such notice has been served."

On June 1, 1889, the defendant company deposited in the post-office at Des Moines, for registration, a written notice, in conformity to such provision of the law, addressed to the defendant at Harlan, Iowa. It does not appear that by due course of mail this notice would have reached its destination thirty days before the fire occurred. The main question in the case is as to the validity of the policy when the fire occurred, July 2. The court gave the following instructions, of which complaint is made: "The notice required by statute may be either personal notice or constructive notice. The defendant claims he gave the plaintiff constructive notice; that is, he sent a notice by registered letter, as required by law. There is no dispute as to the fact that he sent the notice marked 'S' by registered letter. When the defendant sent it, and when the service thereof was completed, are, however, controverted points. And in this connection you are instructed that the service of notice by registered letter is not completed until, by due course of mail for registered matter, it should be received at the office of its destination." The validity of the notice depended upon a completed service of the notice, and the court in another instruction said to the jury that, if it found

"that, by due course of mail for registered matter, such letter would not reach Harlan before June 2, 1889, then, and in that event, said policy would not be suspended until thirty days thereafter, or after the second day of July."

We are then to determine whether, to render such a service complete, there must be time after the letter is properly addressed and registered in the post office for it, by due course of mail, to reach its destination, that is, the office of its destination. If the language of the act was that the service should be made by mail, by letter, or by registered letter, there might be more reason for holding that there must be time after mailing for it to reach its destination. In *McKenna v. Insurance Co.*, 73 Iowa, 453, it is held that the service is complete before the letter is delivered to the assured, showing that the law contemplates something less than a personal receipt of the letter. The statute, as we understand, specifies the acts that constitute the service; and it is the service, and not notice, that gives rise to the operation of the statute. The service may be "by registered letter *addressed to the assured* at his *post-office address named in or on* the policy." The italicized words are adverbial, and fix the manner of the service. With a careful examination, we find no case in which, besides the acts which shall constitute the service, where it is substituted, that time is held essential to its completion. The enactment is the sole authority for such a service, and we can neither add to nor take from its requirements. The substituted service of an original notice, by leaving a copy with a member of the family when the defendant cannot be found in the county, is complete when the notice is properly left, and no time is held necessary to elapse because of the known absence of the defendant from the county. In such a case, the service is complete when the acts specified as constituting the service are

done. In New York, under a statute providing that, "in case of service by mail, the paper must be deposited in the post office," addressed to the person on whom it is to be served, at his place of residence, and the postage paid, the service is held complete when the notice is mailed. *Elliott v. Kennedy*, 26 How. Pr. 422. Our statute provides an additional act,—that of registering. The appellee attempts to mark a distinction between the statutes, on which to base a different ruling, but none really exists. It is said that all that is required under the New York act is that the letter "be properly stamped and addressed, and deposited in the post office." Our statute provides that the service may be made by registered letter, addressed in a particular manner. Both statutes alone provide for mailing. The necessity for time after mailing as conclusively follows under one statute as the other. The practical effect of the statute thus construed is to give the assured nearly thirty days' notice to pay his obligation, and avoid a suspension of his policy under his contract, which cannot be regarded as a harsh rule of construction. It may be also said that the rule, as held by the district court, would involve much difficulty, as is apparent from the record in this case, in determining the time of arrival by due course of mail, and would make the fact of a completed service very difficult to know. This thought is worthy of notice where the legislative intent is doubtful. With these views the court was in error in giving the instruction.

We find no other questions in the record that we need to consider. REVERSED.

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## In the Matter of the Estate of J. S. MAXWELL, Deceased.

**Implied Trusts**: FUNDS OF ANOTHER DEPOSITED TO PERSONAL ACCOUNT: RIGHTS OF BENEFICIARY. The deceased having obtained the release of a mortgage on real estate given to secure an indebtedness to his

mother, sold the real estate, and, with the consent of his mother, retained the amount of the mortgage out of the proceeds of said sale to reinvest for her, she holding the note previously secured by said mortgage. The amount so retained was deposited in bank to the personal account of the deceased, and so remained at the time of his death, except a portion thereof that he had invested in certain real estate, taking the title thereto in the name of his mother. *Held*, that the agreement between the deceased and his mother for the retention of said fund constituted the former a trustee for his mother in relation to said fund, and that the mother was entitled to payment of the amount not invested out of the funds in bank to the personal account of the deceased.

*Appeal from Polk District Court.*—HON. CHARLES A. BISHOP, Judge.

THURSDAY, OCTOBER 22, 1891.

IN a proceeding for the settlement of this estate Sarah M. Drake filed a petition of intervention, claiming that certain money, deposited by the intestate in the Citizens' National Bank in his own name was the money of the intervener, and held by the intestate and deposited as her agent. Upon a trial on the merits the district court made and filed a finding of facts, upon which judgment was entered, dismissing the petition of intervention, from which she appeals.—*Reversed.*

*St. John & Stevenson*, for appellant.

*A. A. Haskins*, for appellee.

BECK, C. J.—I. The findings of facts are to the following effect: The intestate was indebted to the intervener, who was his mother, in the sum of twelve hundred dollars, secured by a mortgage upon real estate. He sold the mortgaged property, and so advised his mother, and requested her to release the mortgage, and retain the note, and proposed to hold the money, and reinvest it for her and in her name. The intervener complied with this request, and sent the

mortgage and release thereof, but retained the note. Subsequently, about the time the intestate caused the release to be delivered and the mortgage discharged, he requested his mother to send him a power of attorney to authorize him to purchase and sell real estate in her name, which would enable him to keep the money of his mother in her name, and in the same way invest it. The intervener complied with this request. The proceeds of the sale of the mortgaged property, to the amount of thirteen hundred and forty-eight dollars and twenty-five cents, were deposited in the Citizens' National Bank of Des Moines. He had at the time a deposit in the same bank amounting to two hundred and forty-seven dollars and eighty cents, and stated that all the deposit he made was not his own money. Against these deposits he drew eight hundred and nine dollars and sixty-eight cents, seven hundred dollars being in payment of town lots in Dakota purchased by him as an investment for his mother, the title being taken in her name. About forty days after the deposit the intestate died, leaving a deposit in the Citizens' National Bank equal to or in excess of the money he held for investment on account of his mother.

II. The counsel for the administratrix maintains that the facts show the transaction to be the discharge of a mortgage security, thereby releasing the claim or lien of the mother against the specific money deposited. Counsel are right in their conclusions that the mother would, after the release of the mortgage, without more, have no claim on the money. A mortgage released to permit a sale of the property free from its lien would not bind the money received in payment for the property. But the facts show something more in the form of an agreement between the parties, to the effect that the money was to be held and invested for the mother. The intestate became the agent and trustee of his mother by this agreement, and acted in pursuance of

such trust, and at his death held as trustee the money claimed in the intervener's petition. We are clearly of the opinion that the facts found show the existence of a trust under which the intestate held the money in question at the time of his death. The plaintiff may follow this money, the trust fund, in the hands of the trustee, and in the hands of the depository holding it for the trustee, the Citizens' National Bank. In our opinion, the district court erred in dismissing the plaintiff's petition upon the facts found. The judgment will be reversed, and a judgment rendered, at intervener's option, in this court, granting the relief prayed for in her petition. REVERSED.

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## HENRY WILSON, Appellee, v. E. E. MCELROY, Administrator, Appellant.

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**Limitation of Actions**: COMMENCEMENT OF SUIT: FILING OF CLAIM AGAINST ESTATE OF DECEDENT: ACTS OF ADMINISTRATOR: ESTOPPEL. Where a claim was filed in proper form against the estate of a decedent, of which no notice was served upon the administrator, but upon which a partial payment was made by the administrator, and an offer made for the payment of the balance in real estate, and which, in a petition for the sale of real estate, was reported by the administrator to the court as a valid claim against the estate, *held*, that the filing of the claim was the commencement of proceedings for its allowance, and stopped the running of the statute of limitation; and that the defendant was estopped by his acts from setting up the statute because no notice was served as provided by section 2408 of the Code.

*Appeal from Wapello District Court.*—HON. CHARLES D. LEGGETT, Judge.

THURSDAY, OCTOBER 22, 1891.

PROCEEDINGS in probate to prove and establish a claim against the estate whereof the defendant is the administrator. The claim was established and allowed, and a judgment or order for the payment entered accordingly. The defendant appeals.—*Affirmed.*

*Chambers, McElroy & Roberts*, for appellant.

*Burton & Jaques*, for appellee.

BECK, C. J.—I. The plaintiff's claim against the estate is based upon two promissory notes executed by the intestate, one due September 11, 1877, the other August 3, 1879. On the eleventh day of March, 1887, the plaintiff filed the claim set up in this case, duly certified by his oath, as required by statute. A notice that the claim would "come on for hearing and proof" on the first day of the next term of the court was served on the defendant January 11, 1890. Subsequently, the plaintiff filed an amended petition or claim, setting up, among other things, facts intended to show that the claim is hereby taken out of the operation of the statute of limitations, which, it seems, was raised on an objection to the allowance of the claim by demurrer before the filing of the amended claim or petition. The defendant filed an answer, denying the allegations of the petition, and claiming that recovery thereon is barred by the statute of limitations. Upon the issues raised by these pleadings the cause was tried by the district court.

II. The evidence, beyond controversy, establishes that the promissory notes constituted a just and lawful claim against the estate, which ought to be allowed, unless the proceeding is barred by the statute of limitations.

III. In our opinion defendant cannot, in view of the facts of the case, invoke the statute to defeat the action. The evidence shows that after the claim was filed for allowance by the court the defendant paid the plaintiff five hundred dollars thereon, and took a receipt showing such payment. He offered to satisfy the whole claim if the plaintiff would accept real estate in payment thereof. He reported to the court the notes as being a valid claim against the estate, and in a petition for the sale of real estate to pay debts the plaintiff's claim is mentioned and referred to as valid and subsisting. We think, in consideration of these facts, the plaintiff's claim is not barred by the statute for these reasons. The filing of the claim was the beginning of proceedings for its allowance. If the claim is approved by the administrator, no notice is required, and the claim may be allowed by the clerk without further proceedings. Code, sec. 2408. This proceeding was commenced, at issue, and ready for judgment without proof, if the administrator had approved the claim. In that case, as no notice was required, the suit was fully commenced without it. It was as in the case of filing a petition in the district court in an action at law and a voluntary appearance and answer admitting the allegations of the petition. In such case the action is commenced and pending upon the filing of the petition, or surely upon the appearance of the defendant, and the provision of Code, section 2532, would not apply to it. Surely, the defendant would not be permitted to withdraw his answer, admitting the allegations of the petition, and file an answer setting up the statute of limitations, on the ground that, as there was no original notice put in the hands of the sheriff, the statute continued to run. In the case before us the defendant in effect approved the plaintiff's claim in his report to the court, in his petition to sell lands, and in his written indorsement of payment made upon the notes. These

acts, in our opinion, are express approvals of the claim, and comply with the requirements of Code, section 2408. Under this section the claim ought to have been allowed without notice, and the statute of limitations ceased to run at the time the notice was dispensed with by the admissions of the plaintiff. In support of these views we cite the following cases: *Smith v. McFadden*, 56 Iowa, 482; *Schriver v. Holderbaum*, 75 Iowa, 33. Surely, after having made payment upon the plaintiff's claim, and recognized it in his report and petition as subsisting and valid, and after offering to pay in real estate, thus leading the plaintiff to believe it was approved and admitted, and inducing him to act accordingly, the defendant is estopped now to set up the statute of limitations to defeat the action. He cannot, by his acts and declarations, induce the plaintiff to delay proceedings in the case, and then, because of such delay, invoke the statute of limitations to defeat the action.

The foregoing considerations are decisive of the case. The judgment of the district court is AFFIRMED.

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# THE STATE OF IOWA, Appellee, v. FRANK WISE, Appellant.

1. **Criminal Procedure:** CERTIFICATE OF EVIDENCE ON PRELIMINARY EXAMINATION: INDICTMENT. Where the stenographic notes of the evidence of witnesses upon the preliminary examination in a criminal cause, taken by one not under oath, were transcribed by the stenographer in type-writing, and such copy was certified to by the justice, and returned to the clerk of the district court as the minutes of testimony taken before him on such examination, *held*, that such certified transcript was sufficiently authenticated to authorize the grand

jury to act upon it, and to indorse the names of the witnesses given therein upon the indictment.

2. ———: NEW TRIAL: SUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT: APPEAL. Where the verdict in a criminal cause appears to the supreme court to be against the clear weight of the evidence, the cause will be remanded for a new trial. [ROBINSON and GRANGER, JJ., *dissenting*.]

*Appeal from Chickasaw District Court.*—HON. L. O. HATCH, Judge.

THURSDAY, OCTOBER 22, 1891.

THE defendant was indicted, tried and convicted of the crime of rape. His motion for a new trial being overruled, judgment was entered against him, from which he appeals.—*Reversed.*

*Noble & Updegraff*, *Hiram Shaver* and *J. H. Powers*, for appellant.

*John Y. Stone*, Attorney General, and *George E. Stow*, for the State.

GIVEN, J.—I. On the trial the appellant objected to the examination of Bertha Lillibridge and W. H. Caton on behalf of the state, for the reason that no minutes of the testimony of either were taken by the grand jury; that they were not witnesses before the grand jury; that no notice that their testimony would be taken had been served; and that what purported to be minutes of their testimony was not taken by any authorized authority, and was not proper to be considered by the grand jury. The objection was overruled, and the ruling is assigned as error.

1. CRIMINAL PROCEDURE: certificate of evidence on preliminary examination: indictment.

It appears from the record that the defendant was held upon preliminary examination to the grand jury;

that upon the preliminary examination the justice called Mr. W. S. Harris to take the testimony of the witnesses; that Mr. Harris took it in shorthand, and afterwards transcribed it in type-writing, which copy the justice certified, and returned to the clerk of the court as the minutes of the testimony before him in the case. Mr. Harris was not sworn to correctly take the testimony, nor to the correctness of the copy, but he testifies that the copy is a true statement of the minutes taken by him. Section 4293 of the Code requires that, "when an indictment is found, the names of all the witnesses on whose evidence it is found must be indorsed thereon before it is presented to the court, and the minutes of the evidence of such witnesses must be presented with the indictment to the court." Under section 4273, an indictment may be found "upon the minutes of the evidence given by witnesses before the committing magistrate." Section 4241 requires the examining magistrate to write out, or cause to be written out, the substance of the testimony given on the examination by each witness examined before him. It is not required that the person whom the magistrate may cause to write out the testimony shall be sworn, or that the minutes sent up by the magistrate shall be verified by his oath or signed by the witnesses. It is the substance of the testimony that is to be taken, and the magistrate, having heard the testimony, may certify that the minutes thereof taken by the person called by him are a correct minute of the substance of the testimony. The minutes of the testimony in this case were taken as authorized by law, and sufficiently authenticated to authorize the grand jury to act upon them, and to indorse the names of these witnesses upon the indictment. There was no error, therefore, in overruling the defendant's objections to the examination of these witnesses. *State v. Rodman*, 62 Iowa, 456.

II. One ground of the motion for a new trial is that the verdict is contrary to the evidence. The rule in such cases is different from that applied in civil cases. This court, though proceeding carefully and cautiously, will interfere in criminal cases more readily than in civil. We will not in a criminal case support a verdict if it be against the clear weight of the evidence. *State v. Tomlinson*, 11 Iowa, 401; *State v. Johnson*, 19 Iowa, 231; *State v. Collins*, 20 Iowa, 85; *State v. Elliott*, 15 Iowa, 72; *State v. Hilton*, 22 Iowa, 241; *State v. Moffitt*, 31 Iowa, 316; *State v. Woolsey*, 30 Iowa, 251; *State v. Campbell*, 69 Iowa, 556; *State v. Billings*, 81 Iowa, 99. In our opinion the verdict is against the weight of the evidence, and the motion for new trial upon that ground should have been sustained.

2. ——: new trial: sufficiency of evidence to sustain verdict: appeal.

As it follows from this conclusion that the case may be retried, we forbear from any discussion of the evidence. Other questions discussed will not arise on a retrial, and are, therefore, not noticed. For the error mentioned the judgment of the district court is REVERSED.

ROBINSON and GRANGER, JJ., dissenting.

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# AMERICAN EMIGRANT COMPANY, Appellant, v. VELANCEY E. FULLER, Appellee.

1. **Pleading:** PLEA OF FORMER ADJUDICATION: GENERAL DENIAL: EVIDENCE. Where, in an action to quiet title to land, the plaintiff pleaded a certain judgment as a final adjudication of the claims of the defendant, to which the defendant answered merely by general denial, *held*, that the jurisdiction of the court was not put in issue by the answer, and that the record of the judgment was competent evi-

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dence in support of the averments of the petition without proof of the service of process therein, nor of the pleadings.

2. **Judgments**: INTERPRETATION: EXTRINSIC EVIDENCE. The lands in controversy were not described in the judgment above referred to, but it was decreed therein that the county of C., through whom the defendants in this action claim title, was estopped from impeaching the title of the plaintiff herein to the lands entered in the name of said county with the swamp land indemnity scrip, that it should convey said lands to the plaintiff, and should not impeach the validity of the contract in relation to said lands between said county and the plaintiff, dated December 12, 1861. To show that the decree applied to the lands in controversy the plaintiff offered in evidence an agreement which recited that it was made on December 12, 1861, but purported to have been signed December 18, 1861, and a deed which referred to the contract as of December, 1861. *Held*, that, in the absence of evidence that other contracts and deeds were made on the dates named, said instruments were sufficient to show that so much of the land in controversy as is swamp land was a part of that referred to in the above judgment.

3. ———: ———. The said decree recited that "This cause coming on for final hearing upon the stipulation of parties, it is ordered, adjudged," etc. *Held*, that said clause was to be construed to mean that the cause came on for final hearing at that time by stipulation of the parties, and not that the decree therein was rendered pursuant to such a stipulation.

4. **Quieting Title**: SWAMP LANDS: ADVERSE POSSESSION: STATUTE OF LIMITATIONS. The lands in controversy were returned to the general land-office as swamp lands, under the swamp-land act of congress of 1850, but in 1858 the secretary of the interior certified the land as being a part of a grant to aid in building a railroad from Dubuque to Sioux City; said grant being made subject, however, to all prior sales or other disposition within its limits. The land was never in the actual occupation of anyone prior to the commencement of this action. *Held*, that the fee-simple title to the land passed to the state by virtue of said act of congress of 1850, and to the county by the act of the general assembly of 1853, and the legal possession thereunder never having been disturbed by the defendant nor its grantors, this action was not barred by the statute of limitations.

5. ———: ———: LACHES: ABANDONMENT OF TITLE. No patent was ever issued transferring the lands in question to the state, but the character of the land was readily ascertainable by anyone, the records of the county showed a conveyance of it to the plaintiff, and the judgment above referred to was rendered only five years prior to the commencement of this action. *Held*, that the absence of any public action on the part of the plaintiff in relation to said land for five

years preceding this action was not sufficient to create a presumption of abandonment of title by the plaintiff, nor that it had acquiesced in the adverse title of the defendant.

6. ———: ———: IDENTIFICATION: EQUITY: JURISDICTION. Where the secretary of the interior has failed to identify any swamp lands lying within the state, the question whether certain lands claimed under the swamp-land act of congress of 1850 are of the character described in said act may be determined by courts of equity in actions to quiet title thereto.

7. **Practice:** EQUITABLE RELIEF: GENERAL PRAYER. A prayer for general equitable relief in an equitable action will not authorize a decree giving affirmative relief for which no foundation has been laid in the pleadings.

*Appeal from Calhoun District Court.*—HON. J. H. MACOMBER, Judge.

THURSDAY, OCTOBER 22, 1891.

ACTION in equity to quiet the title to certain land situated in Calhoun county. Upon final hearing, the district court granted to the plaintiff the relief demanded as to a portion of the land in controversy, and denied it as to the remainder. Both parties appeal, the plaintiff being known as the appellant. *Affirmed.*

*Seevers & Seevers* and *J. J. Davis*, for appellant.

*Charles A. Clark*, for appellee.

ROBINSON, J.—The plaintiff claims to be the owner of the east half of the northwest quarter, the southeast quarter of the northwest quarter, the southwest quarter of the northwest quarter, and the northwest quarter of the southwest quarter of section 27, in township 89 north, of range 33 west. Its alleged title is derived from an act of congress approved September 28, 1850, entitled "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits;" an act of the general assembly of the

state of Iowa, which took effect February 2, 1853, entitled "An act to dispose of the swamp and overflowed lands within the state, and to pay the expenses of selecting and surveying the same;" an agreement made between it and the county of Calhoun, dated December 12, 1861; a deed made by the county to trustees on the fourteenth day of September, 1863; a deed made by the sole surviving trustee to the plaintiff on the twenty-ninth day of February, 1872; and a decree of the circuit court of the United States for the district of Iowa.

The defendant claims title through the Dubuque & Sioux City Railroad Company, under a grant made by act of congress approved May 15, 1856, to aid in building a railroad from Dubuque to Sioux City, and for other purposes. It is agreed that the land in controversy is within the limits of the railroad grant named, and was earned by the building of a road under the grant, if subject thereto, and that the defendant holds whatever title or interest passed under the grant to the railroad company. He demands that his title be quieted as against the plaintiff. The court below rendered a decree in favor of the plaintiff for all the land in controversy, excepting the southeast quarter of the northwest quarter of section 27, and in favor of defendant for that tract.

I. The appellee insists that the agreement made between the county and the plaintiff was void, because not duly ratified by a vote of the people; that the deed to trustees for the benefit of the plaintiff conveyed no title, because based on a void agreement; and that the deed is not shown to have been delivered, and was defective, and not effectual as a conveyance. The appellant denies the alleged defects, and insists that the decree of the federal court is an adjudication as to the validity of the agreement and deed, which is binding

1. PLEADING: plea of former adjudication: general denial: evidence.

upon the parties to this action. The decree was rendered on the twentieth day of May, 1872, and is as follows:

"Calhoun County
*v.*
"American Emigrant Company. } Equity.

"And now, this cause coming on for final hearing upon the stipulation of parties, it is ordered, adjudged and decreed as follows: That the bill of the complainant be, and is hereby, dismissed as upon the merits and final hearing, and that the said dismissal shall forever operate as a bar and estoppel against the complainant to set up any title or right to the lands or funds in controversy in this suit, or to maintain any suit or proceeding, either at law or in equity, in anywise impeaching the title of the American Emigrant Company to the lands in controversy in this suit, or the lands entered in the name of said county, with the swamp-land indemnity scrip; and said Calhoun county shall convey to the defendant said last-named lands as hereinafter described, and said county shall not in any manner impeach the validity of the contract between said Calhoun county and the American Emigrant Company, dated December 12, 1861, or the deed executed to said American Emigrant Company, or in trust for said company, dated September 14, 1863. * * *"

The only land described in the decree is denominated "scrip land," and is in Kossuth county. The only part of the record proven was the decree. The appellee contends that the proof was insufficient under the pleadings to show a valid adjudication in favor of the plaintiff of the title to the lands in controversy, and numerous authorities are cited in support of the doctrine stated as follows: "The general rule is that, when a party intends to avail himself of a decree or an adjudication upon the subject-matter, and not merely to prove collaterally that the decree was made, he must

show the proceedings upon which the decree was founded. The whole record which concerns the matter in question ought to be produced." 1 Greenleaf on Evidence, sec. 511.

The petition alleges that, after the making of the contract and deed by the county, it brought suit in the district court of the county to obtain a decree setting them aside, and declaring them void, and to recover the land and interests thereby conveyed, including the land in controversy; that said suit was removed to the circuit court of the United States for the district of Iowa, and such proceedings had therein that on the date specified a final decree was rendered, declaring the contract and deed valid, and binding on the county, and establishing the title to the land and interests thereunder, including the land in suit, in the plaintiff, and decreeing that the county be estopped and forever restrained from making any claim adverse to the plaintiff and from in any manner impeaching the validity of the contract or deed. The answer to these averments is a general denial.

The common-law rule in regard to pleading judgments has been somewhat relaxed by statute. 12 American & English Encyclopedia of Law, 149*e–g*, and authorities therein cited. In this state it is not necessary in pleading a judgment to state the facts conferring jurisdiction, but it is sufficient to state that the judgment was duly rendered. Code, sec. 2714. If such statement is denied, it is not sufficient to do so by a general denial, but the facts relied on must be specifically stated. Code, sec. 2717. The judgment is that part of the record of a case which is of final importance. It is that for which the parties litigate, and that which determines their rights. It is that which gives them the relief to which they are entitled. The service of the original notice and the pleadings are but means to an end. A judgment for money is a lien

upon the real estate of the judgment debtor in the county where rendered. Code, secs. 2882, 2883. It may be made a lien upon his land in other counties by filing therein attested copies of the judgment. Code, secs. 2884, 2885. When an execution is sent into another county than that in which the judgment was rendered, a transcript of the judgment should be filed in the county to which the execution is sent. Code, sec. 3031. When real property is the subject of an action brought and determined in another county, a transcript of the final order, judgment or decree should be filed in the county where such land is situated, to give constructive notice of the adjudication. Code, sec. 2629. These and other statutory provisions, which need not be specified, show that special force and effect are given to the judgment entries of courts in this state having general jurisdiction. In such cases, the judgments are presumed to have been duly rendered by a court having jurisdiction, not only of the subject-matter of the litigation, but of the litigants, so far as necessary to authorize the rendition of the judgment, until the contrary is shown. It is not necessary to inquire into the service of process until the question of service is properly made an issue.

Courts sometimes exceed their jurisdiction in granting relief not demanded or not authorized by the pleadings, but the presumption is that the relief granted is authorized, and the burden is upon him who attacks the judgment to show that it was not. Every act of a court of competent jurisdiction is presumed to have been rightly done until the contrary appears. *Harvey v. Tyler*, 2 Wall. 328; *Kipp v. Collins*, 33 Minn. 394; 23 N. W. Rep. 554. The competency of judgment entries, and even of entries in the judgment docket, without other parts of the record, has been frequently recognized by this court. *Suiter v. Turner*, 10 Iowa, 525; *Weider v. Overton*, 47 Iowa, 539; *Rea v. Scully*, 76

Iowa, 345; *Taylor v. Wendling*, 66 Iowa, 563; *Moore v. McKinley*, 60 Iowa, 373. In our opinion, the record of the judgment was competent evidence, without proof of the service of process and the pleadings. *Beck v. Henderson*, 76 Ga. 369; *Gardere v. Columbian Ins. Co.*, 7 Johns. 518; *Baudin v. Roliff*, 14 Am. Dec. 183.

II. The land in controversy is not described in the judgment, hence other evidence was necessary to identify it as being included in that contemplated by the decree. It would have been proper practice certainly to have introduced a duly authenticated copy of the pleadings. *Fowler v. Doyle*, 16 Iowa, 535. Whether, if objection had been made, such proof would have been required as being the best obtainable, we need not determine, for the reason that other evidence to show the application of the decree was introduced without objection. That extrinsic evidence is competent to prove what was in fact adjudicated, when the record is not sufficiently clear for that purpose, is well settled, and not denied by the appellee. *Russell v. Place*, 94 U. S. 606; *Goodenow v. Litchfield*, 59 Iowa, 231.

2. JUDGMENTS: interpretation: extrinsic evidence.

To show that the decree applied to the land in controversy, the plaintiff introduced evidence that an agreement between the plaintiff and Calhoun county, for the conveyance by the latter of all its swamp land to the former, had been made and ratified by the voters of the county, the agreement itself, and the deed executed by virtue of it. Evidence which tended to show that the land was in fact swamp and overflowed, within the meaning of the act of congress, was also submitted. The appellee objects to the agreement and deed, on the ground that they are not sufficiently identified by the decree. That refers to a contract between the county and the plaintiff "dated December 12, 1861." The first part of the contract is in language as follows: "Memoranda of an agreement made the twelfth day of

December, 1861, between the county of Calhoun, in the state of Iowa, of the first part, and the American Emigrant Company," etc. The sentence next preceding the signature is as follows: "In witness whereof, said parties have hereunto set their hands and seals this eighteenth day of December, 1861." There is no conflict between the dates given. The instrument recites that it was made on the twelfth day of December, 1861, and that must be regarded as the date when it was in fact made, and the last one mentioned as the date on which it was formally signed. The deed refers to the contract as "bearing date the twelfth day of December, 1861." It is true, it is possible that other contracts and deeds may have been made on the dates named in the decree, but it is not at all probable that they were, in view of the fact that those introduced included all the swamp land of the county. In the absence of any showing to the contrary, we think the evidence introduced was sufficient to show that so much of the land in controversy as is actually swamp land was a part of that to which the decree referred.

III. It is said that the decree was rendered by consent of the county, and is, therefore, invalid.

s. —: —.

Whether such consent would have rendered the decree invalid, is a question not involved in the case, for the reason that the record does not show that the decree was so rendered. It recites that the cause came on "for final hearing upon the stipulation of parties," and not that the decree was rendered pursuant to the stipulation.

We are entirely satisfied, from the record, that the decree rendered by the federal court adjudicated the legality of the contract between the county and the plaintiff, and the deed executed in performance of it. They must be regarded as valid for the purposes of this action. The deed was sufficient in form to operate as a conveyance of all the interests of the county in its

swamp land, and must be held to have had that effect. It follows that whatever title the county acquired under the swamp-land grant was transferred to the appellant.

IV. It is claimed that the action of the plaintiff is barred by the statute of limitations. The land in question was selected as swamp by the agents of the county, and a return thereof made to the general land-office; but it does not appear that the list so returned was ever acted upon by the secretary of the interior. In the year 1858 he certified the land as being a part of the grant to aid in building a railroad from Dubuque to Sioux City. It is not shown that the land was ever in the actual occupation of anyone prior to the commencement of this action in the year 1877. It is the theory of the appellee that the legal title to the land was conveyed by the certificate of the secretary of the interior in the year 1858, and that a right of action then accrued in favor of the claimant under the swamp-land grant. An action for the recovery of real property is barred if not brought within ten years from the time the cause of action accrues. Code, sec. 2529, par. 5. But we do not think this case is within that provision of the statute. It has been held repeatedly, not only by this court, but by the supreme court of the United States, that the swamp-land act of congress of 1850 operated as a grant *in præsenti* by virtue of which the title was at once vested in the state. "The grant itself, without a patent, conveyance or any formal assurance, passed the title to the grantee." *Page Co. v. B. & M. Ry. Co.*, 40 Iowa, 521, and cases therein cited; *Snell v. Dubuque & S. C. Ry. Co.*, 78 Iowa, 90; *Wright v. Roseberry*, 121 U. S. 488; 7 Sup. Ct. Rep. 985, and cases therein cited. The act of the general assembly of Iowa of 1853 operated in the same manner to vest the title acquired by the state in the respective counties in which it was

4. QUIETING title: swamp lands: adverse possession: statute of limitations.

located. By virtue of these acts, the fee title to the swamp land in question was in Calhoun county in the year 1853. The transfer of the title carried with it the legal possession of the land. *Robinson v. Lake*, 14 Iowa, 424; *Jones v. Hockman*, 12 Iowa, 107. That possession was never disturbed by any actual entry by the defendant or his grantors. But it is said that the certification by the secretary of the interior carried with it the legal title. The grant of May 15, 1856, was made subject to all prior sales or other disposition of the land which was within its limits. That condition was recognized in the certificate of the secretary of the interior. The list which he certified purported to be of "the vacant and unappropriated lands in the alternate sections, designated by odd numbers, for sixteen sections in width on each side of the railroad." The approval of the list was subject to all the conditions of the act named, "and to any valid interfering rights which may exist to any of the tracts" embraced in the list. Although the list was *prima facie* evidence of the land which belonged to the grant, yet it did not in fact create any right adverse to the title transferred by the swamp-land act, but was subject to it.

An act of congress approved August 3, 1854, provides that such lists, so far as they include land not embraced in the granting act, "shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby." 1 Lester on Land Laws, 236; *Fremont Co. v. Burlington & N. W. Ry. Co.*, 22 Iowa, 130. Therefore, as to the swamp land contained in the list, the certificate created no interest and gave no right of possession, but merely created a cloud upon the title. The defendant, having failed to show title or actual possession as to such land, has failed to show that the action is barred. Buswell on Limitations, sec. 237; Cooley on Constitutional Limitations, 449.

V. It is claimed that the plaintiff's cause of action is barred by laches and acquiescence in the apparent title of the defendant. No patent transferring the land in question to the state under the swamp-land act was ever issued, and the records of Calhoun county failed to show a claim of title from the general government to the plaintiff, but the character of the land was readily ascertainable by anyone, and it was selected, recognized and treated as swamp by the officers and agents of Calhoun county. The public records of that county showed a conveyance of it to the plaintiff. The action commenced by the county terminated in a decree rendered in the year 1872, quieting the title to the land in the company. This action was commenced in the year 1877. The defendant and his grantors necessarily had knowledge of the claim of the plaintiff, and the lapse of five years from the date of the decree in the federal court to the commencement of this suit, without public action on the part of the plaintiff, if none was in fact taken, was not sufficient to create a presumption of abandonment; and, even if the defendant and his grantors had paid the taxes during that time, and before, in the absence of possession, that fact would not change the rule. The plaintiff has been asserting title for many years. There is no evidence that it has ever abandoned it, or that it has given any one reason to believe at any time that it acquiesced in any adverse title.

5. ——: ——: laches: abandonment of title.

VI. The appellee contends that courts of equity are without jurisdiction to inquire into and determine the character of the land, for the reason that it was the duty of the secretary of the interior to do so. The swamp lands were selected, and lists, with proof, were filed in the general land-office, in the year 1860. It was his duty to act upon them, but it does not appear that he has done so.

6. ——: ——: identification: equity: jurisdiction.

It is now well settled that in such a case the character of the land may be ascertained and determined by a court of competent jurisdiction. That was announced as the law in *Railway Co. v. Smith*, 9 Wall. 95. In *Wright v. Roseberry*, 121 U. S. 488; 7 Sup. Ct. Rep. 985, the authorities on that question were reviewed, and the law was announced as follows: "The result of these decisions is, that the grant of 1850 is one *in præsenti*, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal, to which the determination of the matter is intrusted; but, when that officer has neglected or failed to make the identification, it is competent for the grantees of the state, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object." See, also, *Snell v. Dubuque & S. C. Ry. Co.*, 78 Iowa, 90, and cases therein cited. That the courts have jurisdiction in cases like this to ascertain and determine the character of the land cannot now be successfully questioned. If it be determined that any of the land in question is swamp or overflowed land, within the meaning of the swamp-land act of 1850, it will be, in effect, determined that it was not intended to be included in the list certified by the secretary in 1858, and that as to such land the certificate is void.

We understand that the appellee does not now claim that any of the tracts of land adjudged by the district court to belong to the plaintiff were not of the character contemplated by the swamp-land grant. If we are mistaken in this, it is sufficient to say that the evidence shows clearly that all of them are of that character. The evidence as to the southeast quarter of the northwest quarter of section 27 is conflicting, but

in our opinion a decided preponderance of the evidence shows that more than one-half of it is swamp and overflowed land.

VII. It is urged by the appellee that, if any of the land in controversy is found to belong to the plaintiff, it should be compelled to refund the taxes which the defendant and his grantors have paid. An insurmountable objection to our granting such relief is the fact that the proper foundation for it was not laid in the pleadings. It is true the defendant in his answer asks for general equitable relief, but the only reference to taxes paid to be found in his answer is an averment, in connection with the pleading of the statute of limitations, that the defendant, and those under whom he claims, have continuously paid the taxes since the year 1861. The payment of the taxes was pleaded in connection with the matter as a defense, and not as a basis for affirmative relief. The payment was denied by the plaintiff, but, as no demand for affirmative relief was based on the alleged payment of taxes, it was not necessary, if proper, for the plaintiff to plead any defense it may have had to the claim founded on such payment; and the question of its liability therefor is not an issue, and cannot be adjudicated. *Tice v. Derby*, 59 Iowa, 315.

7. PRACTICE: equitable relief: general prayer.

What we have said disposes of the controlling questions in the case. The judgment of the district court as to both appeals is AFFIRMED.

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## AMERICAN EMIGRANT COMPANY, Appellee, v. ROGERS LOCOMOTIVE MACHINE WORKS *et al.*, Appellants.

**Swamp Land Act of 1850:** WHAT LANDS INCLUDED: CONSTRUCTION OF STATUTE. The swamp-land act of congress of 1850, conveying to certain states "the whole of those swamp and overflowed lands made unfit thereby for cultivation" within the borders of said states, and

providing that the same should include "all legal subdivisions, the greater part of which is wet and unfit for cultivation," was intended to cover all subdivisions of land, the greater part of which is not arable. The fact that land is capable of being seeded to such grasses as timothy or red top, and mowed year after year, and crops of grass be thereby secured, will not exclude it from the operation of the act.

*Appeal from Calhoun District Court.*—HON. J. H. MACOMBER, Judge.

THURSDAY, OCTOBER 22, 1891.

ACTION in equity to quiet the title to certain land situated in Calhoun county. On final hearing the district court granted to the plaintiff the relief demanded as to a portion of the land. The defendants appeal. *Affirmed.*

*Chas. A. Clark*, for appellants.

*Seevers & Seevers* and *J. J. Davis*, for appellee.

ROBINSON, J.—This action was brought to quiet the title to certain tracts of land claimed by the plaintiff under the swamp-land grant, made by the act of congress approved September 28, 1850. The defendants claim title under the act of congress approved May 15, 1856, which granted land to the state of Iowa to aid in the construction of a railway from Dubuque to Sioux City. Of the land in controversy, the district court found and adjudged that two lots and fifteen forty-acre tracts belonged to the plaintiff, and that thirty-one such tracts belonged to the defendants.

I. The chains of title under which the respective claims of the parties are made are the same as those considered in the case of *American Emigrant Co. v. Fuller*, *ante*, p. 599. Numerous legal questions are presented in this case which were determined in that, and it is only necessary to say that as to such questions our rulings in that case are followed in this.

Questions have been presented in regard to the sufficiency of the abstracts and of the certificate of the judge of the district court to identify and preserve the evidence which was introduced, and also that which was offered, in the case. The appellants have filed an amendment to their abstract, which is not denied, and which shows that by appropriate proceedings in the district court the certificate of the judge has been amended to meet the objection made by the appellee. A stipulation to the effect that the judge had certified and duly made of record all the evidence offered or introduced in the case had been made and filed. We do not understand that the appellee is now insisting upon its objections. However that may be, we are of the opinion that they were not well founded, upon the record submitted to us. The alleged defects in the certificate were cured by the *nunc pro tunc* order of the district court. The appellant has filed in this court transcripts and the original evidence, duly certified, and the case is in condition to be considered on its merits.

II. We are required to determine the character of each of the seventeen tracts of land which were adjudged by the district court to belong to the plaintiff. The defendants have offered no evidence with respect to six of them, and admit that they are swamp land, within the meaning of the swamp-land act of 1850. The evidence shows without serious conflict that six of the remainder are of the same character. The controversy as to five of the tracts is more serious, but a careful consideration of the evidence leads us to conclude that they must also be classed with the others. The grant included "the whole of those swamp and overflowed lands, made unfit thereby for cultivation," which remained unsold at the passage of the act within the states to which it applied. The third section of the act provided that the tests to be made of such land

should include "all legal subdivisions the greater part of which is wet and unfit for cultivation. Each of such subdivisions was to be classed as swamp and overflowed land, within the meaning of the act. The test thus made was not whether the greater part of any subdivision was in fact overflowed land, but whether it was so wet as to be unfit for cultivation. It might be of that character, although never overflowed, and land might be sometimes overflowed without being of a swampy character. The question necessarily arises, what kind of cultivation was contemplated by the act? A considerable part of the evidence on the part of the defendant was given on the theory, that, if the greater part of any subdivision could be seeded to such grasses as timothy or red top, and mowed year after year, and crops of grass be thereby secured, it was not so wet as to be unfit for cultivation, and, therefore, was not swamp land. But by the cultivation of land is ordinarily understood something more than the gathering of crops which grow spontaneously, or with little care. Land which can be cultivated, within the meaning of the act, is arable land,—that which is adapted to the raising of crops which require annual planting and tillage, as corn, wheat, oats, rye and barley in this country, and which is susceptible of such cultivation in all ordinary seasons. It is proper to observe in this connection that the conclusion we have reached is in harmony with the rules observed by the general government in administering the swamp-land grant. 1 Lester on Land Laws, 543, 547; *In re Poweshiek Co.*, 9 Decisions of Department of Interior, 124 (relating to public lands). See, also, *Thompson v. Thornton*, 50 Cal. 144; *Keeran v. Allen*, 33 Cal. 547; *Keeran v. Griffith*, 31 Cal. 465.

Applying the rules stated to the evidence in this case, we find without difficulty that all the tracts of land in controversy are swamp and overflowed lands,

within the meaning of the swamp-land act of 1850. The judgment of the district court is, therefore, AFFIRMED.

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# James McKee, Administrator, Appellee, v. Chicago, Rock Island & Pacific Railway Company, Appellant.

1. **Railroads:** ROADWAYS: DUTY TO EMPLOYES. It is the duty of a railroad company to use ordinary care and supervision to keep its roadway in a good and safe condition for the operation of its trains by its employes, to the end that its employes may not be exposed to unnecessary hazards in such employment.

2. ———: NEGLIGENCE: CONSTRUCTION OF ROAD: RULES FOR EMPLOYES: EVIDENCE. A rule of a railroad company, designed for the guidance of its track repairers, that "they must see that no lumber, wood, stone, materials or tools are placed at any time within five feet of the rail," is not evidence that a cattle-guard fence built three feet and ten inches from the rail was improperly constructed. Neither is a rule requiring such employes to keep the fences and cattle-guards in good repair evidence of the negligence of a railroad company in permitting such a fence to stand too close to the track, when it is not claimed that the fence in question was out of repair.

3. ———: ———: ———: DEGREE OF CARE REQUIRED. A brakeman on a freight train, observing that stones were being thrown from the track under one of the defendant's cars, went forward from the caboose, and climbed down the ladder on the side of said car, and while hanging low on the ladder, and looking under the car, with his back toward the locomotive, his head came in contact with a wing fence at the end of a cattle-guard, and he was instantly killed. The evidence showed that the stones which attracted the attention of the decedent were thrown out by a brakebeam, which was down and dragging; that in operating trains it sometimes happens that a brake-beam, or other appurtenance of the trucks of a car, gets out of order, and that it is the duty of the brakeman who discovers it to report the fact to the conductor, and under his direction to ascertain what, if anything, requires attention, and, if necessary, to stop the train; that to make the required examination it may be proper for the brakeman to descend the ladder at the end or on the side of the car, and look under it while the train is in motion. It did not appear, however, that such an event was of common occurrence, nor that any accident caused by the location of a wing fence had ever happened on the road of the defendant, although its road had been operated many years.

*Held*, that conceding that the fence could, with reasonable care, have been so constructed that the decedent would have passed the same without injury, yet the accident was so improbable, and was due to causes of such rare occurrence, that the defendant, in the exercise of reasonable diligence, was not required to provide against it.

4. ———: ———: ———: CONTRIBUTORY NEGLIGENCE: USE OF DEFECTIVE APPLIANCES BY EMPLOYE. The decedent, having been employed as brakeman on the division of the road on which the accident occurred, for about three years, with his runs usually in daylight, and it appearing that there were about four hundred wing fences on such division, substantially like that in question as to plan of construction, and the distance thereof from the track; and it further appearing that the side ladders of a car could be used with safety in examining the condition of trains while passing said wing fences, but that it was apparent to anyone who had observed the width of the spaces between the fences and the passing cars, that a person could not safely swing out from a car while passing such a fence, on its level, more than two feet, *held*, that the decedent must be presumed to have known, from his opportunity to have acquired such knowledge, that the distance between the fence in question and a passing car made it unsafe for one to swing out more than two feet from the car, as he did, and that in exposing himself unnecessarily to such danger, the decedent was guilty of contributory negligence. [BECK, C. J., *dissenting*.]

*Appeal from Wayne District Court.*—HON. J. W. HARVEY, Judge.

FRIDAY, OCTOBER 23, 1891.

ACTION to recover damages alleged to have been caused by the negligence of the defendant. There was a trial by jury, and a verdict and judgment in favor of the plaintiff. The defendant appeals.—*Reversed.*

*Freeland & Miles*, *Cummins & Wright* and *Thos. S. Wright*, for appellant.

*Geo. Hall*, for appellee.

ROBINSON, J.—In September, 1888, Joseph M. Brown was in the employ of the defendant as brakeman on a freight train. The division on which he worked extended from Trenton, in Missouri, to Eldon, in this state. On the twentieth day of the month named, he

left Trenton with his train. When it reached the vicinity of Numa he was in the caboose, and, observing stones which appeared to be thrown from the track under the second car from the caboose, he went forward to ascertain the cause. He first went down on the north side of the car, and then climbed back, and went down on the south side by means of the side ladder. While hanging low on the ladder, with his back towards the locomotive, looking under the car, his head came in contact with a wing fence at the end of a cattle-guard, and he was instantly killed. This action is brought by the administrator of his estate to recover the resulting damages.

It is claimed by the plaintiff that the defendant was negligent in allowing the fence to be placed so near the track as it was, and that the decedent was killed in consequence, and without fault on his part. The defendant denies the alleged negligence on its part, and the alleged absence of negligence on the part of the decedent, and alleges that he had been employed by the defendant on the part of its road where the accident occurred for several years; that during that time the fence and cattle-guard of which complaint is made were not changed, and were like the other cattle-guards and appurtenances along that part of its road,—all of which was well known to the decedent long prior to his death.

I. The court charged the jury as follows: "It is the duty of a railroad company, as regards its employes, to use all ordinary care and supervision to keep its roadway, for the operation of its by its trains employes, in a good and safe condition, so that the employes may not be exposed to unnecessary hazards in the operation of its trains." "The deceased * * * had a right to assume that the defendant would use all reasonable care in the keeping of its road in a good and safe condition for

1. Railroads: roadways: duty to employes.

the operation of its trains by its employes. * * *"
The defendant complains of the portions of the charge quoted, on the ground that they require the defendant to keep its road in a safe condition, while the rule is that it must be kept in a reasonably safe condition. We do not think the jury would so understand the charge. It instructed them that it was the duty of the defendant to use all ordinary and all reasonable care and supervision to keep its roadway safe, and that, we think, is the law. If the road could have been made safe by such means, then it was the duty of the defendant to make it so.

II. The only charge of wrong against the defendant is that it negligently placed the fence with which the decedent came in contact too close to the track. That it was a proper appurtenance of the road, is not questioned. The evidence shows that all the cattle-guards and cattle-guard fences along the line of the defendant's railway, upon which the decedent had been employed, were constructed substantially alike. As we understand the record each cattle-guard was made by digging a pit across the roadbed about eight feet wide and two feet deep. Across the pit were placed timbers, and on them were laid ties from twelve to fourteen feet in length. At each end of the ties was constructed a wing fence eight feet in length parallel to the track. It was made of two posts, and boards nailed thereon, and to its center was attached the right-of-way fence. The posts of the wing fences inclined outward somewhat, but, as a rule, were nearly perpendicular to the surface of the earth, and were from three feet, five inches to four feet, seven inches from the rails. The fence which caused the accident in question was three feet, ten inches from the rail at the bottom, and inclined outward at the top three inches. There is no competent evidence that it was

2. ——: negligence: construction of road: rules for employes: evidence.

improperly constructed or located. Certain rules of the defendant, designed for the guidance of its track repairers, were, however, introduced in evidence over the objections of the defendant. One of the rules so introduced is as follows: "*Second.* They must see that no lumber, wood, stone, materials or tools are placed at any time within five feet of the rail, and that all gravel and ballast is leveled so as not to endanger the safety of the trains." It is urged by the appellee that this rule is evidence that a wing fence should not be placed within five feet of the track, and it is claimed that, if the one in question had been placed that distance from it, the accident would not have occurred. But the rule cannot be given the effect claimed for it. It evidently does not refer to permanent structures, but to loose tools and materials. There would be good reason for requiring articles which might be readily moved by the wind, by animals or other cause, without the concurrence and against the wish of the defendant, to be placed further from the track than appurtenances of the road, which are permanently attached to the earth or roadbed.

Other rules required the track repairers to examine their sections daily to ascertain if the track was safe, and to observe closely the fences, and to keep them and the cattle-guards in good repair. It is not claimed that the fence in question was not in good order, and the rules gave the repairers no authority to move it. The rules were, therefore, improperly admitted. The jury were instructed that they could not presume negligence from the fact that the accident occurred, but there was no other evidence of such negligence.

III. It is said, however, that the cattle-guard and fence could, with reasonable care, have been so constructed that the decedent would have passed the fence in safety. That may be conceded, and the question then arises

3. ——: ——: ——: degree of care required.

whether the accident was of such a nature that the defendant should have guarded against it. The stones and ballast which had attracted the attention of the decedent, and caused him to descend the ladder on the side of the car, and look under it, were thrown out by a brakebeam which was down and dragging. The evidence shows that, in operating trains, it sometimes happens that a brakebeam or other appurtenance of the trucks of a car gets out of order. When there are indications that such a state of affairs exists it is the duty of the brakeman who discovers it to report the fact to the conductor, and under his direction to ascertain what, if anything, requires attention, and if necessary to stop the train. To make the required examination it may be proper for the brakeman to descend the ladder at the end or on the side of a car, and look under it while the train is in motion. But the evidence does not show that such an event is of common occurrence, and it does show without contradiction that it is not customary for a brakeman to descend the side of a car while it is in motion between stations. It does not appear that any accident caused by the location of a wing fence had ever happened on the road of the defendant before that in question, although its road had been operated many years.

The undisputed facts of this case bring it within the rule announced in *Koontz v. Chicago, R. I. & P. Ry. Co.*, 65 Iowa, 226. The facts involved in that case were substantially as follows: A train of the defendant was stopped on a bridge because the engineer supposed that some of the cars were off the track, or that one of the brakes was set. A brakeman who had been riding in the cab of the engine got down, and in the discharge of his duty proceeded to walk back beside the train to ascertain what cause, if any, there was for stopping. While so engaged he fell through the bridge, and received injuries which caused his death. This

court held that it was not the duty of the railway company to plank every bridge and cattle-guard to prevent accidents to its employes, although it might have anticipated that trains would be required to stop at other than the usual stopping places; and it was said that "ordinary care does not require that every possible contingency must be anticipated and guarded against, but only such as are likely to occur." That such is the rule applicable to cases of this kind is well settled by the authorities. In *Wabash, St. L. & P. Ry. Co. v. Locke*, 112 Ind. 404; 14 N. E. Rep. 395, it is stated as follows: "The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor that the company should have employed any particular means which it may appear, after the accident, would have avoided it. It was only required to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident." In *Loftus v. Union Ferry Co.*, 84 N. Y. 459, the material facts involved were as follows: A child six years of age fell from a bridge or float adjoining the passage-way for passengers going upon or leaving the ferry-boat into the water, and was drowned in consequence of an alleged defect in the guard at the side of the bridge or float. The guard, at the time of the accident, was in the condition it had been in for years. Many people had passed that place yearly, and no accident like that complained of had happened before. The court held that the ferry company was bound to provide suitable and safe accommodations for the landing of passengers, and that the rule of strictest diligence in that respect was the only one consistent with a due regard to the value of human life, and with the relations of the company to the public. It further held that "the rule does not impose upon the defendant the duty of so providing for the safety of passengers that they shall encounter no possible danger, and meet

with no casualty, in the use of the appliances provided by it. It was possible for the defendant so to have constructed the guard that such an accident as this could not have happened, and this, so far as appears, could have been done without unreasonable expense or trouble. If the defendant ought to have foreseen that such an accident might happen, or if such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence." The company was held not liable, because it appeared that it had no reason to apprehend an accident like that for which it was sought to make it liable, and that the arrangements it had made were such as experience had, up to that time, shown to be safe and suitable, and sufficient to meet the requirements of its duty.

In *Sjogren v. Hall*, 18 N. W. Rep. (Mich.) 813, a case in which an employe in a steam sawmill sought to recover for injuries sustained in the course of his employment, the supreme court of Michigan said it was the duty of the mill-owner to guard against probable dangers, not to make accidental injuries impossible. It was further stated, in effect, that the fact that the employe, who was not wanting in intelligence nor incapable of judging of probable danger, continued to expose himself without hesitation, and apparently without fear, to such risks as those were, was very conclusive proof either that the employer was not culpable in the matter complained of, or that the employe was inexcusably careless of his own safety. It was further said, in effect, that the fact that, after the accident occurred, it was seen that it could have been easily guarded against, was no reason for holding the employer liable.

To have guarded against the accident in controversy, it was necessary for the defendant to foresee that something might occur to one of its moving trains which would make it proper for an employe to descend

a car to look beneath it, and that he would descend, and swing himself out from the car while passing a wing fence, to make the desired examination. It is undoubtedly true that the defendant might readily have known that such a combination of circumstances was possible, but it is apparent that it was not likely to occur. So far as the record shows, the accident in question was so improbable, and it was due to causes of such rare occurrence, that the defendant, in the exercise of reasonable diligence, was not required to provide against it. It is readily seen now how it could have been avoided, but it does not appear that anyone anticipated it, or anything of that nature. It is not shown that complaint of the wing fences was ever made to the defendant, nor that it had any reason to anticipate accidents from them. They were properly constructed, so far as the record discloses, and the defendant had reason to believe, from the length of time during which it had operated the road without accident from them, that they were properly located.

IV. Another objection to a recovery by the plaintiff on the record submitted is that it clearly appears the accident would have been avoided by the use of ordinary care on the part of the decedent. He had been employed as brakeman on the division on which the accident occurred in all about three years, and his runs were usually made in daylight. On that division there were about four hundred wing fences, all of which were substantially like that in question, as to plan of construction and distance from the track. The distance between the wing fences and the sides of passing box cars was about two feet, and it is shown without contradiction that the side ladders could be used with safety in examining as to the condition of trains in passing the wing fences in question. But it must have been apparent to anyone who had observed the width

4. —: —: —: contributory negligence: use of defective appliances by employe.

of the spaces between the fences and passing cars, that a person could not safely swing out from a car while passing such a fence on its level more than two feet, and that an attempt to do so would be apt to result in serious injury.

It is said that there is no evidence that decedent knew the distance of the fence from the passing car, but that claim is in conflict with the approved rules of evidence. It was said in *Muldowney v. Illinois Central Ry. Co.*, 39 Iowa, 620, that "the means of knowing by ordinary care is evidence of knowledge." If it be shown that a given statement was made in the presence and hearing of a person possessed of the ability to hear, the presumption, conclusive in the absence of a showing to the contrary, is that he heard it. If it be shown that an event, capable of being seen by any ordinary observer, occurred in the presence of a person possessed of the ability to see, and that his attention was at the time directed to it, it will be presumed, until the contrary appears, that he saw it. So a person engaged in a particular employment will be presumed to have that knowledge of the dangers incident to his employment which he could have acquired by the use of ordinary diligence.

In *Mayes v. Chicago, R. I. & P. Ry. Co.*, 63 Iowa, 563, it was shown that the plaintiff's intestate was a switchman or brakeman in the employment of the defendant, and that his death was caused by the negligence of the defendant in failing to place blocks between the rails and the guardrails at the switches. It was said by this court, in effect, that the knowledge of defects possessed by an employe, and his ability in the exercise of ordinary diligence to acquire knowledge thereof, are questions of fact to be determined on the evidence submitted in cases where the defects or dangers are not open and obvious to every one serving

in the capacity of an employe; but that the rule was not applicable to that case, for the reason that the decedent had worked over the track in question for six weeks, and must be presumed to have known of the defect, and that it was dangerous. The plaintiff in *Mooney v. Lower Vein Coal Co.*, 55 Iowa, 671, sought to recover for injuries received from a falling roof while working as a miner in the mine of the defendant. This court held as follows: "The true rule is that if plaintiff knew, or by the exercise of ordinary care might have known, of the unsafe condition of the roof, and he continued to work in the dangerous place without protest or complaint, and without being induced to believe that a change would be made, he assumed the risk and cannot recover." In *Muldowney v. Illinois Central Ry. Co.*, *supra*, this court approved the following: "When an employe has the means of acquiring knowledge, by the exercise of ordinary care and diligence, of the defects or imperfections in the machinery or cars about or upon which he is employed, and continues in his employer's service without objecting to, or protesting against, the use of such defective or imperfect cars or machinery, he will be held to have assumed all the risks incident to the use of the cars and machinery in such defective condition." The court cited a large number of cases as supporting the rule. In *Perigo v. Chicago, R. I. & P. Ry. Co.*, 52 Iowa, 276, it appeared that the defendant had erected a coal platform between two of its tracks at Winterset, and, for convenience in unloading and taking on coal, placed it so near one of the tracks that a passenger car, moving along the track, passed within seven inches of the platform at one end, and within four and a half inches of it at the other end. The platform had been in the position described two years, when a baggageman in the employment of the defendant, while engaged in the discharge of his duties in helping to make up a train, was knocked off the car

by the coal platform, thereby receiving injuries which resulted in his death. He had been in that employment for more than two years, and had assisted in making up the train during nearly every day of that time. In considering an instruction in which the rule under consideration was stated, the court said: "It is now the established doctrine of this court, in harmony with the current of authority elsewhere, that an employe who knows, or by the exercise of ordinary diligence could know, of any defects or imperfections in the things about which he is employed, and continues in the service without objection, and without promise of change, is presumed to have assumed all the consequences resulting from such defects, and to have waived all right to recover for injuries caused thereby."

The rule, as thus stated, was approved in *Wells v. Burlington, C. R. & N. Ry. Co.*, 56 Iowa, 524. The facts involved in that case were that the plaintiff's intestate was a brakeman in the employment of the defendant, and had been so engaged for more than four years upon that part of its road where the accident occurred. He was killed by being knocked from the top of a freight train by the timbers of a bridge over which the train was passing. The bridge timbers with which he came in contact were a little more than five feet above the top of the car, while he was more than six feet in height. There were other bridges of like construction and height on that part of the road, over which he had often passed. In the opinion written by Beck, J., it was held that an instruction embodying the rule under consideration should have been given. It was also said, in regard to the dangers of the employment, that "the knowledge of the intestate and his failure to make objections may be shown by circumstances and inferred from his conduct. Direct proof on these points is not required. The knowledge of the dangerous character of the bridge may be inferred

from opportunities of obtaining such knowledge in the exercise of ordinary care." In *Gould v. Chicago, B. & Q. Ry. Co.*, 66 Iowa, 590, it appeared that the plaintiff's intestate, a locomotive engineer in the employment of the defendant, was fatally injured while in the discharge of his duties. He had been instructed to make a certain trip without stopping at any station, unless signaled or specially directed so to do. It was the duty of the conductor or brakeman to make signals to the engineer from the rear end of the train when passing stations. While the train was passing a station on the trip the engineer went to the fireman's side of the engine, and leaned out of the gangway, looking back for the expected signal. He was almost instantly struck by a water crane, and injured as stated. The water crane, or the frame supporting it, was about two feet from the floor of the gangway upon which the engineer was standing when he was struck. This court approved an instruction to the effect that if the crane was so located as to be reasonably safe for trainmen operating trains in a reasonably safe and prudent manner, then the defendant was not guilty of negligence in the location of the crane, and disapproved one which stated, in effect, that, if the crane was placed in such close proximity to the track as to be dangerous to the persons operating the trains, then the defendant might be found guilty of negligence in locating and erecting it. In considering that instruction, the court, speaking by Beck, C. J., stated that "it is not true that a railroad company is to be regarded as negligent in erecting or maintaining contrivances or things for use in the operation of their roads, for the reason that they are dangerous to the persons operating the trains. Indeed, the whole business of operating trains is dangerous. It is full of perils to those employed therein. Because there is danger, it does not follow that the companies are neg-

ligent as to the things from which the danger springs. The instruction should have expressed the thought that, if the crane was dangerous to persons operating trains in the exercise of ordinary care, the defendant was negligent in constructing it."

The rule under consideration is too well grounded in reason and authority, and has been too long followed by this court without dissent, to be now abandoned. When applied to the facts in this case, its effect cannot be a matter of doubt. The decedent, during his long term of service on the road in question, could not have failed to observe, in the use of ordinary diligence, that the wing fences were too near the track to permit a person to swing out from the bottom of a passing car with safety. This is especially true if the trainmen were required to descend the sides of moving cars, and look beneath them as was done in this case, so frequently that the defendant should be charged with knowledge of such examinations, and be required to provide for them. The decedent may not have known the exact distance of any wing fence from the track, but he could not have avoided knowing that he could not safely do that which he attempted if he had given the matter that attention which his duty to his employer and to himself demanded. The accident occurred at about noon of a pleasant day. The track where it occurred was straight. There were no obstructions, and decedent could have seen the fence which caused his death, from his position at the bottom of the ladder, for a distance of nine hundred and thirty feet before it was reached. There was nothing in the condition of the car which he sought to examine, as it appeared at the time to justify him in exposing himself to any unusual risk. There was nothing to indicate such an impending danger to the employes or property of the defendant, nor to passengers, as justified the decedent in acting without regard to his own safety.

It appears that a brakebeam or lever, or a brake loose and dragging, might have thrown the stones from the track, or that a swingbeam might have thrown them from ballast filled in too full. It is not shown that when stones were thrown as were those in question it was regarded as indicating unusual danger, or anything of a serious nature, althought it made an examination as to the condition of the train necessary. That the decedent was not alarmed by what he saw is shown by what he did. It was his duty to report to the conductor if he saw anything wrong with the train. He made no report in this case, but proceeded without orders, evidently not for the purpose of averting an apparent and impending danger, but to ascertain if one existed. The conductor and a fellow brakeman were near him in the caboose when he left it, but he did not regard the cause of his leaving of sufficient importance to call their attention to it.

In *Hosic v. Chicago, R. I. & P. Ry. Co.*, 75 Iowa, 686, it appeared that a brakeman was injured in attempting to set a brake in obedience to a signal which was unusual, and indicated that prompt action was required. It was held that, under the facts of that case, the brakeman was justified in attempting to obey the signal, although in so doing he knowingly incurred risk to himself; but the rule of that and similar cases has no application to this case. It clearly appears from the undisputed facts of the case and the authorities cited that the defendant is not shown to have been negligent in the provision it has made for the safety of its employes in the matter in controversy. The case of *Loftus v. Union Ferry Co.*, *supra*, is even authority for the conclusion that it has exercised that higher degree of care which a passenger might have demanded. On the other hand, it appears that, had the decedent used reasonable care to ascertain and avoid the danger to

which he exposed himself, the accident which caused his death could not have occurred.

What we have said disposes of all questions discussed by counsel which are likely to arise on another trial. For the reasons indicated the judgment of the district court is REVERSED.

Beck, C. J. (*dissenting*).—I. The undisputed evidence shows that the plaintiff's intestate, Joseph M. Brown, had been for several months employed as a brakeman upon trains running on that part of the road where the accident resulting in his death occurred. The deceased, being in the cupola of the caboose, while the train was running in daylight under ordinary conditions, saw stones flying from the ballast of the roadbed, so that they could be seen by him from the cupola. He knew from this indication that some part of a car was coming in contact with the roadbed, and thereupon went upon the top of the car, thence down its side upon the ladder, and returned to the top, went down the ladder on the other side, and swinging himself from the ladder so that he could do so, looked under the car to see what part of it was dragging upon the roadbed. While in this position his head came in contact with the upright part of a cattle-guard, and he was instantly killed. There was a panel of fence extending along the cattle-guard on the side furthest from the track, to the middle of which the fence was attached. The fence was three feet, ten inches from the rail at the bottom, and four feet and one inch at the top. Other cattle-guards varied, as to the distance from the rails but little, one way or the other from this measurement. It was found that a brakebeam was down, and was dragging upon the roadbed, which caused the stones to be thrown off the track. The deceased was looking backward when he was killed. He was not directed by the conductor to examine and report as to the cause

of the stones flying from the track. There was evidence tending to show that an ordinary freight car projects about two feet beyond the rail, and that it was the duty of a brakeman, upon observing indications of a brake-beam or the like being down, to examine into the matter and ascertain the cause of the indications, and this could be done only by looking under the car in the manner deceased attempted.

II. Was it the duty of the deceased, upon observing indications of parts of the car or machinery near the track being out of order, to ascertain what was the cause of the indications in order to prevent injury to the train from the defective parts of the car? Evidence was submitted to the jury to the effect that upon such an occurrence it was customary for the brakeman to do just as the deceased attempted to do, namely, descend the ladder, and obtain a view of the parts under the car, so that whatever was necessary to avoid danger could be done. A witness for defendant testified that it was the duty of the deceased to report the fact to the conductor, and from him have orders to descend the side of the car. But, if it be assumed that he should have pursued this course, it does not follow he was negligent in acting without the conductor's orders. It was the case of the discharge of duty without waiting for orders. It is very plain that the emergency required prompt action; that the deceased acted just as the emergency required. Now, to hold that the deceased, because he did the act he would have been required to do had he reported to the conductor, was negligent, would condemn him for prompt intelligence and faithful services, intended to protect the property of the defendant and the lives of himself and other trainmen. But we cannot hold that, in such a case, a trainman must, before he acts, report for orders. Such a rule would often expose life and property to destruction, for in the management of trains which move at a high rate of speed prompt-

ness and celerity of action are to be commended, indeed required, in the right discharge of duty by the trainmen. I need not further present reasons for holding that the deceased, in the discharge of his duty, descended the ladder and attempted to see the parts of the car out of order. But I may repeat what I have before intimated, that preservation of human life and protection to the property of the defendant required deceased to do this duty, and do it promptly.

III. Now, if it were the duty of the deceased to descend the ladder and look under the car, it cannot be doubted that the defendant was required to construct the cattle-guards so that his life would not be destroyed in the discharge of duty. Therefore, if the parts of the cattle-guard were so near the car as to expose the body of the deceased to contact therewith, they were negligently constructed. A great deal more could be said upon these points, but I refrain from continuing their discussion.

IV. It is insisted that, as the act done by the defendant was rarely demanded, the indications—the flying of the stones—were something unusual, and the defendant was not required to anticipate the occurrence, and so provide that danger to its employes would not result therefrom. We cannot say, as a matter of law, that the occurrence of the brakebeam or other timber under the car being down is so unusual that it could not or ought not to have been anticipated. Indeed, the evidence tends to show that such things were quite familiar to at least one witness, who had been a trainman; and it is a matter of common knowledge that the timber and irons of the machinery and trucks are exposed to breaking, and from other causes they become out of order. Timbers, irons or stones, not connected with cars, may become fastened to parts of the trucks, and other things of this character may occur, all of which would, if not removed, cause

destruction of property and of life. The character of these dangers can only be known by a view under the cars. Now, surely the defendant ought so to construct its track, cars and cattle-guards that a trainman may in safety so act when such occasions arise that life and property will be protected. The evidence in this case shows that the part of the cattle-guard was about two feet and two inches from the side of the car, and probably even less from the ladder upon which the deceased was supporting himself when he was killed. The jury were authorized to find that deceased was killed while in the discharge of his duty, and that the discharge of that duty, and duty of that character, may be required at any time, or at any place, upon a moving train, and, therefore, that danger from cattle-guards so near the track should have been anticipated and provided against by the defendant. The cases and authorities cited in the majority opinion are not in conflict with these views and conclusions.

V. It was the duty of the defendant to so construct the cattle-guards as not to endanger the safety or life of the employes operating trains on the railroad, and, under familiar rules, intestate was authorized to believe that the defendant had done its duty in this regard, and to believe that no danger of the character caused by the cattle-guard existed. He could rest in this belief, and act accordingly, until he obtained actual knowledge that the danger existed. *Muldowney v. Illinois Central Ry. Co.*, 36 Iowa, 463; *Kearns v. Chicago, M. & S. P. Ry. Co.*, 66 Iowa, 599; *Snow v. Housatonic Ry. Co.*, 8 Allen, 441; *Gibson v. Pacific Ry. Co.*, 46 Mo. 163; *Faren v. Sellers*, 39 La. Ann. 1011; 3 S. Rep. 363; *St. Louis, Ft. S. & W. Ry. Co. v. Irwin*, 37 Kan. 701; 16 Pac. Rep. 146; *Dorsey v. Phillips*, 42 Wis. 583; *Chicago & N. W. Ry. Co. v. Swett*, 45 Ill. 197; *Porter v. Hannibal & St. J. Ry. Co.*, 71 Mo. 66; *Lewis v. St. L. & I. M. Ry. Co.*, 59 Mo. 506; *Petty*

*v. Hannibal & St. J. Ry. Co.*, 88 Mo. 306; *Devlin v. Wabash, St. L. & P. Ry. Co.*, 87 Mo. 545.

VI. If the deceased knew, or could have known in the exercise of reasonable diligence, the danger to which he exposed himself by attempting to discharge the duty he undertook to protect defendant's property, by descending the ladder in order to discover the cause of the stones from the roadbed flying out from under the car, and thus voluntarily put his life at hazard, he was negligent, and thereby contributed to the injury resulting in his own death, and his representative cannot recover. But there is no evidence tending to show that he had such knowledge, or that in the exercise of reasonable diligence he could have acquired it. It is not shown that he, or any other employe of the defendant, knew the distance the fences of the cattle-guards were from the cars or the rails, nor that he or they knew just what distance between the car and the fence would enable one to do what he attempted with safety, or what distance would render the act dangerous. It is not shown that any employe of the defendant or the deceased had any reason to believe that he exposed himself to danger from the fences by attempting to look under the car. It is a case where the employes and witnesses of the defendant are exceeding wise after a life has been sacrificed, and measurements have been made. No one appears to have thought of the danger before. This very view is taken in the opinion of the majority to excuse the defendant's negligence, namely, that the accident was so improbable and unexpected that the defendant cannot be regarded as negligent in maintaining the fence so near the car; but the victim of the accident is to be held by the majority of the court to have been negligent for not knowing the danger, while the defendant is to be held free of negligence because the accident could not have been anticipated. I protest against such discrimina-

tion in favor of the defendant. The simple facts are that the fence was dangerously near the track, and there is no evidence tending to show that the intestate knew it, or that in the exercise of reasonable diligence he could have acquired knowledge of such fact. The considerations distinguish the case from *Mayes v. Chicago, R. I. & P. Ry. Co.*, 63 Iowa, 562; *Gould v. Chicago, B. & Q. Ry. Co.*, 66 Iowa, 590; *Wells v. Burlington, C. R. & N. Ry. Co.*, 56 Iowa, 524, and other like cases cited in the majority opinion as applicable on this point. In my opinion the judgment of the district court ought to be affirmed.

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## CITY OF KNOXVILLE, Appellant, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY *et al.*, Appellees.

**Cities and Towns:** POWERS: NUISANCES: FINES. A city or incorporated town has no authority to provide by ordinance for the punishment by fine of persons guilty of the crime of nuisance.

*Appeal from Marion District Court.*—HON. A. W. WILKINSON, Judge.

FRIDAY, OCTOBER 23, 1891.

INFORMATION on oath was filed with the mayor of the city of Knoxville, accusing the defendants "of the crime of erecting, keeping and maintaining a nuisance in said city, * * * in violation of the ordinances of said city, for that they used and kept a stock yard, for the keeping and loading of stock, in such condition as to constitute a nuisance under said ordinances." It is

asked in the information "that said defendants be dealt with according to law, and that said nuisance be abated." The defendants, being served with notice, appeared, and separately demurred to the information, upon the grounds that the information was insufficient, and "because this court has no jurisdiction to try and determine this case under the ordinances of said city." The demurrers were overruled, and after hearing all the evidence on both sides the court found that there was a nuisance at the time of the filing of the information, by reason of the condition of the stock yards, and that the defendants had abated said nuisance, and adjudged that the defendants pay the costs. From this judgment the defendants appealed to the district court, and the plaintiff's motion to dismiss the appeal being overruled the case was called for trial to a jury. After all the evidence was introduced, the court, on motion of the defendants, instructed the jury: "You are instructed that the city of Knoxville had no power or authority to pass the ordinance under which the defendants are being prosecuted, and, such being the case, the ordinance is null and void, and you will return a verdict in favor of the defendants." A verdict was returned accordingly, and judgment entered against the plaintiff for costs, from which the plaintiff appeals to this court.—*Affirmed.*

*L. Kinkead*, for appellant.

*J. D. Gamble*, for appellees.

GIVEN, J.—I. The discussions resolve themselves into the single inquiry, whether the city of Knoxville had power to pass the ordinances under which this prosecution is had. Eight sections of the ordinance are set out at length, but the parts necessary to be noticed are in substance as follows: It declares what shall constitute a nuisance, and includes such acts as

are charged against the defendants, and provides that upon conviction the accused shall be subject to a fine not exceeding twenty-five dollars for the first offense, and in case of a continuance of the nuisance "a fine, the amount of which shall be the aggregate of ten dollars for each day such offender shall continue such nuisance after the first conviction, in no case exceeding one hundred dollars and costs." It is also provided: "And in all cases of conviction under this ordinance, whenever it shall appear to the court that such nuisance exists at the time of conviction, the court shall order and adjudge the removal or abatement or destruction, as the case may require, of such nuisance."

The contention as to the power of the city to pass this ordinance is fully answered in *Incorporated Town of Nevada v. Hutchins*, 59 Iowa, 506. It has been uniformly held that cities and incorporated towns have no authority to pass ordinances except as conferred by statute. Their authority as to nuisances is expressed in section 456 of the Code as follows: "They shall have power to prevent injury or annoyance from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated." The acts with which these defendants are charged are declared to be a nuisance by section 4089 of the Code. The power given by section 456 is to abate nuisances. In *Incorporated Town of Nevada v. Hutchins*, *supra*, it was held that the town had no authority to provide, by ordinance, for the punishment by fine of persons guilty of a nuisance. Following that, and the cases therein cited, we hold that the city of Knoxville had no authority to provide, by ordinance, for the imposition of fines against persons committing a nuisance, as defined in the ordinance; that the power of the city is limited to providing for the abatement of such nuisances. The power to provide, by ordinance, for the abating of nuisances is a complete answer to the appellant's argu-

ment that great prejudice would result to the citizens if nuisances can only be abated by the slow processes of indictment or action in equity. Cities and incorporated towns have power to provide, by ordinance, for the abatement of nuisances, but not for the punishment, by fine, of those guilty of maintaining the nuisances. Punishment must be by indictment under the Code.

II. It is contended that although part of the ordinance providing for punishing the offender by fine be void, yet so much as provides for abating the nuisance is valid. *Santo v. State*, 2 Iowa, 165, and *City of Keokuk v. Keokuk N. L. Packet Co.*, 45 Iowa, 197, are cited. This question is not involved in the case before us. The information charged a crime, the prosecution was criminal, and for the recovery of a fine the abatement of the nuisance was a mere incident. The mayor found that the nuisance had been abated, and, hence, the appellant did not then or after ask, or was it then entitled to, an order of abatement. There was nothing left of the case but to determine whether the defendants were liable to a fine under the ordinance for having maintained the nuisance which, upon notice, they had abated. The question not being involved in the case, we do not determine whether so much of the ordinance as provides for abating nuisances is valid or not, but only that the part thereof providing for fine upon conviction was passed without authority, and is void.

The judgment of the district court is AFFIRMED.

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## J. H. FLANAGAN, Appellee, v. BALTIMORE & OHIO RAILROAD COMPANY, Appellant.

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83 639
120 171
o120 569

83 639
125 415

83 639
142 691

1. **Negligence**: PERSONAL INJURY: CONTRIBUTORY NEGLIGENCE: INSTRUCTIONS. Where in an action for damages for personal injuries, sustained through the negligence of a railway company, no instructions were asked or given to the jury concerning the rules of contributory

negligence as affecting the plaintiff's right to recover, but the petition alleged the exercise of care on the part of the plaintiff, and it clearly appeared from the evidence that the defendant was negligent, and that the plaintiff was free from negligence, *held*, that the omission in the instructions was without prejudice to the defendant.

2. ———: ———: INSTRUCTIONS TO JURY. The accident in which the plaintiff was injured having been caused by the spreading of the rails, the defendant asked two instructions to the effect that the fact that the switch at which the car left the track was not locked did not constitute negligence, if the purpose of the lock was not to prevent spreading of the rails. These instructions the court modified, by adding the words, "If the defendant used due care and diligence, as herein expressed, to otherwise fasten and secure the switch. *Held*, that as the verdict would have been for the defendant if the jury had found that the defendant had used due care to fasten and secure the switch, the modification of the instruction was without prejudice to the defendant.

3. ———: DAMAGES: PLEADING: EVIDENCE. The insufficiency of the facts pleaded in the petition as the basis of a claim for damages cannot be raised for the first time by objections to the admission of evidence upon the trial.

4. ———: ———: ———: ———. Where damages for loss of time are claimed, because of injuries causing permanent disability, it is not necessary that the petition allege the character of the plaintiff's occupation, and the amount of his earnings, to authorize proof of such facts upon the trial.

5. ———: COMPENSATORY DAMAGES: EVIDENCE: INSTRUCTIONS. The jury were instructed that in their determination of the amount of compensatory damages to be recovered by the plaintiff, they should allow such damages as would "fairly compensate" the plaintiff "for what he paid out or incurred for medical attendance." *Held*, that the instruction being in the alternative as to the allowance of such expenses either paid or incurred, the instruction was not erroneous though the evidence failed to show the actual payment of any sum; and that the jury must have understood from such instruction that only reasonable and necessary expenditures were to be allowed.

*Appeal from Clinton District Court.*—HON. A. HOWAT, Judge.

FRIDAY, OCTOBER 23, 1891.

ACTION to recover damages for personal injuries sustained by the plaintiff while a passenger upon the

ant's railroad car, by reason of the negligence of 'endant's employes. There was a judgment on ict for the plaintiff. The defendant appeals. *d.*

*S. Bailey* and *A. P. Barker*, for appellant.

*'alter I. Hayes*, *J. S. Darling* and *A. L. Schuyler*, ›ellee.

ICK, C. J.—The questions argued by the defend- ›ounsel involve the correctness of the rulings of ırt upon the instructions. No other branches of e can be discussed.

No instructions were asked or given announc- e rules of the contributory negligence of the plaintiff. It is now insisted that the court erred in failing to present to the jury the rules of law upon that subject. The plaintiff's care is duly alleged in the peti- ıe allegations whereof are denied in the answer. ridence fails to show negligence on the part of aintiff, but, on the other hand, clearly shows the time of the accident, which was a collision by a defective switch, the plaintiff was in a and safe place on the car, and did no act tend- endanger his person or expose it to injury. Had ›een a verdict based upon a finding of the plain- ıegligence, it would have been utterly without ›port of the evidence, and for that reason would ›een set aside. It follows that no prejudice have resulted to the defendant by the failure of ırt, by instructions, to direct the attention of the › the issue involving the plaintiff's care, and the ›n to present to them rules to guide them in ıg a conclusion thereon.

II. The defendant requested the court to give two instructions, to the effect that the fact, that the switch at which the car left the track was not locked, did not constitute negligence, if the purpose of the lock was not to prevent spreading of the rails, which caused the car to leave the track. The court modified the instruction by adding thereto these words, "if the defendant used due care and diligence, as herein expressed, to otherwise fasten and secure the switch." In a prior instruction the court had, in effect, directed the jury that, if the defendant had negligently failed to fasten and secure the switch, and the accident was caused thereby, the defendant was liable to the plaintiff for the injury he sustained. The modification to the instruction is not clear. It could not, however, have been the purpose of the court to instruct the jury, and they would not have so understood the modification, that the defendant would be liable for neglect in not locking the switch, if it had not used due care to secure it otherwise. It is probable that the court intended to say to the jury that the defendant would not be liable on account of the switch, if the lock was not intended to prevent spreading of the rails, or if due care was not exercised to otherwise fasten the switch. We think no prejudice resulted from the instruction, for, if the jury had found that the defendant had used due care to fasten and secure the switch in accord with the modification, the verdict would have been for the defendant under that modification, as well as under the prior instructions referred to therein. If the jury had found that the defendant failed to use such due care, then the verdict should have been for the plaintiff under such prior instructions. It clearly appears that the modification could not have worked prejudice to the defendant.

2. —: —: instructions to jury.

III. The plaintiff was permitted to prove his skill as a mechanic, and that he was employed as an overseer in a carriage manufactory, and the wages he received. It is insisted this evidence was not admissible, for the reason that there was no allegation in the petition as to his skill or capability to earn wages. If the defendant esteemed the petition insufficient to disclose the facts upon which claims for damages could be based, a motion for a more specific statement of the petition as to the matter would have been sustained, if made by the defendant, who cannot be permitted to raise this objection first at the trial, when he had ample opportunity to make it in time to permit correction of the defect in the pleading before trial. *Luck v. City of Ripon*, 52 Wis. 196; 8 N. W. Rep. 815; *Hunter v. Stewart*, 47 Me. 419; *City of Bloomington v. Chamberlain*, 104 Ill. 268.

3. ——: damages: pleading: evidence.

IV. The petition claims damages for loss of time for injuries causing permanent disability. It is not necessary that the petition allege the character of the plaintiff's occupation, and the particulars as to his earnings, to authorize the introduction of evidence showing his occupation and the extent of his earnings. *Wade v. Leroy*, 20 How. 34; *Treadwell v. Whittier*, 22 Pac. Rep. (Cal.) 266.

4. ——: ——: ——: ——.

V. The eleventh instruction directed the jury that the plaintiff was entitled to recover compensatory damages, and that in determining the amount thereof they should "allow him for what he paid out or incurred for medical attendance." The instruction clearly directs the jury to allow the plaintiff whatever expenses he paid, or for which he became liable, for medical attendance. It is insisted that this instruction is erroneous, for the reason that there is no evidence that the plaintiff paid any sum for medical attendance.

5. ——: compensatory damages: evidence: instructions.

The language of the instruction above quoted directs the allowance of medical expenses "paid out or incurred." Being in the alternative, it would be followed by allowing for the medical expenses "incurred" (become liable for,—Webster's Dictionary), and the jury could not have understood that they were directed to find for expenses paid in the absence of proof thereof. Our conclusion on the point is not in conflict with *Reed v. Chicago, R. I. & P. Ry. Co.*, 57 Iowa, 23, and *Stafford v. City of Oskaloosa*, 57 Iowa, 748. In these cases there was no evidence to which instructions as to medical expenses, either paid or incurred, were applicable.

The defendant objects to the instruction just referred to, for the reason it did not limit the expenses for which the plaintiff may recover to such as were reasonable or necessary. The instruction directs the jury that they should allow the plaintiff such damages as would "fairly compensate him." The jury would surely understand that unreasonable or unnecessary outlays would not be the foundation upon which to allow fair compensation, and, therefore, such outlays should be excluded from the consideration. But, if the instruction be regarded as faulty in not limiting the expenses to be allowed to such as are reasonable or necessary, no prejudice resulted to the defendant therefrom. The medical expenses were shown by the evidence to be forty or fifty dollars. It is not pretended that the expenditure of such a sum was unreasonable or unnecessary. We will presume that the finding of the jury as to the expenses did not exceed the amount thereof shown in the evidence. The defendant, therefore, suffered no prejudice by reason of the instruction.

These considerations dispose of all questions in the case. The judgment of the district court is AFFIRMED.

# FIRST NATIONAL BANK OF GRAND HAVEN, Appellant, v. L. R. HALL, Appellee.

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| 83 | 645 |
| 88 | 538 |
| 83 | 645 |
| 93 | 146 |
| 83 | 645 |
| 96 | 401 |
| 83 | 645 |
| 108 | 609 |

**Promissory Notes:** ALTERATION BY PAYEE: VALIDITY. Where a promissory note be made by filling printed blanks prepared for that purpose, and the blank designed for the insertion of the rate of interest was by agreement left without any rate being inserted, and the blank filled by a line or dash, and after delivery of the notes the line or dash was erased, and the figure "8" inserted in its stead, *held*, the alteration was sufficient to render the notes invalid.

*Appeal from Webster District Court.*—HON. S. M. WEAVER, Judge.

FRIDAY, OCTOBER 23, 1891.

ACTION upon two promissory notes executed to Cole, Grant & Co., indorsed in blank by the payee, and transferred by delivery to the plaintiff bank. The defenses pleaded are: *First.* Fraud at their inception; and, *second*, their alteration since their execution, by inserting in each of them a rate of interest at eight per cent. The jury returned its general verdict for the defendant, with the following special findings: "*First.* Do you find that the notes in suit have been altered or changed as claimed by defendant? *A.* Yes.

"*Second.* Were the notes obtained from the defendant by fraud, and without consideration, as alleged by him? *A.* Yes.

"*Third.* Did plaintiff have any knowledge or notice of such fraud in the procurement of the notes at the time it purchased them? *A.* Unable to agree."

Upon the verdict judgment was entered for the defendant, from which the plaintiff appeals.—*Affirmed.*

*Martin & Wambach*, for appellant.

*Botsford, Healy & Healy*, for appellee.

GRANGER, J.—Assignments of error are based on the action of the court as to both defenses. The court instructed the jury that if it found for the defendant that the notes had been materially changed or altered it need not consider the defense as to fraud. By the first special finding it appears the jury did so find; and, hence, if there is no reversible error as to that branch of the case, we need not consider assignments as to the other, because for errors therein we could not reverse.

The notes in suit were made by filling blanks prepared for that purpose, and the allegations of the answer, supported by the testimony of the plaintiff, are to the effect that the blank in the notes designed for the rate of interest was left by agreement without any rate being inserted, and the blank filled by a line or dash, and that said line has in each note been erased and the figure "8" inserted, so that by the present terms of the notes they bear interest at eight per cent. There is no dispute but that the alteration, if made, is material, and would, under the general rule as to alterations of written instruments, avoid the notes. But it is urged by the appellant that it was negligence for the defendant to sign and deliver the notes with the blank for the rate of interest unfilled, and that, as to the dash or line in the blank space, it does not appear that it was made with ink, or entirely filled; and it is claimed that the holder of a note with blanks thus left has a right to fill them, and the rule is invoked that, as between a person thus placing a note in the hands of another and innocent third party, the party to whom the note is intrusted will be deemed the agent of the party making the instrument to fill such blanks, and some authorities are cited; but we think the legal

phase of the case in these particulars has been considered and determined in *Knoxville Nat. Bank v. Clark*, 51 Iowa, 273, and that a further discussion of the questions is not required. As to the fact of the alteration the evidence is so conflicting that we cannot interfere. Although the notes do not on their face indicate to us that they have been altered, with the positive testimony of the plaintiff of the agreement as to interest, and the fact of how the notes were when signed, there is a conflict, which it is not our province to settle. AFFIRMED.

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## UNION BUILDING ASSOCIATION, Appellee, v. ROCKFORD INSURANCE COMPANY, Appellant.

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| 83 | 647 |
| 88 | 368 |
| 88 | 617 |
| 90 | 638 |
| 83 | 647 |
| 100 | 209 |

1. **Practice in Supreme Court:** ASSIGNMENTS OF ERROR: FORM. An assignment of error based upon an alleged error of the trial court in excluding evidence of a particular fact need not recite the question which was the subject of such ruling of the court, nor the name of the witness of whom the question was asked.

2. **Fire Insurance:** PREMIUM: RECEIPT OF PAYMENT IN POLICY: ESTOPPEL. A clause in a policy of insurance against fire, acknowledging the receipt of payment of the premium thereon, but which was not paid in fact, and remained unpaid at the date of loss thereunder, will not estop the insurer from setting up such non-payment as a defense to an action upon such policy by a mortgagee to whom the loss was made payable, and who had no notice of the non-payment of the premium, where it appears that the delivery of the policy to the insured was made by mail upon his express promise to remit the amount of the premium upon the receipt of the policy.

*Appeal from Jones District Court.*—HON. J. H. PRESTON, Judge.

SATURDAY, OCTOBER 24, 1891.

ACTION on a policy of insurance. The petition shows that on the sixteenth of October, 1888, the

defendant company issued to one George R. Moore its policy of insurance against loss by fire on certain property in Oxford Junction, Iowa; that at the time the plaintiff company held a mortgage on the property for twenty-five hundred dollars; and the policy contained a provision as follows: "Loss, if any, is payable to Union Building Association, of Clinton, Iowa, as its interest may appear;" that on the fifth day of February, 1889, the building was partially destroyed by fire, resulting in damage to the plaintiff in the sum of fifteen hundred dollars. The policy also contained a provision as follows: "This company shall not be liable by virtue of this policy, or any renewal thereof, until the premium thereof is actually paid." It is pleaded in the answer, as a defense, that the premium for the policy in question was never paid. The plaintiff, to avoid this defensive plea, replied as follows: "That said policy of insurance set out in plaintiff's petition was obtained by said George R. Moore for the purpose of protecting the interest of plaintiff in said property therein insured, as mortgagee, of which fact defendant had full knowledge at said time; that defendant issued said policy, and sent the same to plaintiff, and recited in said policy that the same was issued 'in consideration of forty-two dollars to them in hand paid by the insured hereinafter named, the receipt whereof is hereby acknowledged;' that at no time, either prior to or subsequent to said loss, has defendant notified plaintiff that said premium was not paid, nor has defendant ever demanded the same of plaintiff, and plaintiff had no knowledge that the same was not paid, or that defendant claimed the same was not paid; and said defendant is now estopped from asserting that said premium is unpaid, as against this plaintiff." The cause was submitted to a jury that returned a verdict for the plaintiff, and from a judgment thereon the defendant company appeals.—*Reversed.*

*Marshall & Taggart* and *Sheean & McCarn*, for appellant.

*Remley & Ercanbrack*, for appellee.

GRANGER, J.—I. It is urged by the appellee that the assignments of error by appellant are not sufficiently specific to justify us in a consideration of them. With our view of the case, it is only important that we consider the fourth, which is as follows:

1. PRACTICE in supreme court: assignments of error: form.

"The court erred * * * in sustaining plaintiff's objections to the testimony and evidence offered by defendant tending to prove that the premium named in the policy sued on had never been paid by plaintiff, or by anyone else, nor any part thereof, and in refusing to permit defendant to prove that no part of said premium had ever been paid; which ruling and proceeding were prejudicial to defendant, and to which ruling and proceeding defendant excepted at the time."

It is said that this assignment "does not state what questions were asked, to which the objections made by plaintiff were sustained, nor to what witnesses the questions were put." In case of an assignment as to the admission or exclusion of evidence, the law does not require that the questions shall be embodied therein. It is not the province of the assignment to contain the part of the record relied upon as showing error, nor is the name of the witness of whom questions are asked material. The error, if any, consists in the exclusion of the evidence offered to establish a material fact in issue. The assignment specifies the fact, and states wherein the court erred, as by refusing evidence proper to sustain such fact. We think the assignment sufficiently specific.

II. We have omitted from the statement of the case issues not essential to the question which we think it important to consider. The application for the policy was by letter, and concluded as follows:

2. FIRE insurance: premium: receipt of payment in policy: estoppel.

"If you wish to renew at compact rates, you can send renewal to yours truly, and I will remit, and am

"GEORGE R. MOORE."

In pursuance of the application the policy was sent from Rockford, Illinois, to George R. Moore, at Oxford Junction, Iowa, with a letter requesting him to remit the amount of the premium due, and the policy was by Moore delivered to the plaintiff company. To sustain the allegation of the answer, that the premium had never been paid, the defendant offered the deposition of one Charles E. Sheldon, who was secretary of the company, in which appears the following question: "State whether or not the premium mentioned in said policy has been paid." There was an objection to the question "as being incompetent and immaterial, for the defendant is estopped from denying the receipt of the premium as stated in the policy." The court sustained the objection, and the ruling is made a ground of complaint to us.

As we view the record and the arguments we are brought fairly to consider the question whether the defendant company, by issuing the policy as it did, with an acknowledgment of a receipt of the premium, and a statement therein that the "loss, if any, is payable" to the plaintiff company, estops the defendant, as against the plaintiff, from proving non-payment of the premium. It will be seen that the policy was not delivered to Moore upon a credit, but that the parties to the contract of insurance intended it as a cash transaction. Moore agreed to remit the premium on receipt of the policy, and the policy was sent to him with a direction to remit. Until the premium was paid there

was not a complete transaction between the defendant company and Moore; and it is not questioned but that, as to Moore, the policy would be void if the premium was not paid. It is then a question how the relation of the plaintiff company to the transaction changes the rule as to the defendant company's liability.

The defendant company sent to Moore the policy with the words therein, "loss, if any, is payable to Union Building Association of Clinton, Iowa, as its interest may appear." Mr. Flanders, in his work on fire insurance (page 441), says: "Where the policy provides that the loss, if any, is payable to another, to a mortgagee, for example, instead of the assured, it is merely a designation of the person to whom it is to be paid, and is not an assignment of the policy. Hence, it is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers. The insurance being upon the interest of the insured, if he parts with that interest before the fire, no loss is sustained by him, and, of course, none is recoverable by his assignee or appointee. In other words a policy made "payable to A, in case of loss," is an agreement on the part of the insurers that "A" shall recover whatever the person originally insured may be entitled to receive in case of loss; that is, it is a contingent order or assignment of what may become due under the contract, and not an absolute transfer, by virtue of which the assignee acquires the full rights of an assignee of a chose in action." The rule thus stated has the support of many well-considered cases. In *Continental Ins. Co. v. Hulman*, 92 Ill. 154, where this principle in question was involved, the language above is quoted, and the court says: "Making the loss, if any, payable to Hulman & Cox, mortgagees, was not an insurance of their mortgage interest in the property." The supreme court of Massachusetts has repeatedly held to such a

rule. In *Franklin Sav. Inst. v. Central M. F. Ins. Co.*, 119 Mass. 240, the plaintiff was a mortgagee; and the policy provided that it was to be payable, in case of loss or damage, to the mortgagees "as their mortgage claim may appear." The policy was declared void because, in violation of its terms, the property afterwards became unoccupied. The court says: "It has been repeatedly held by this court that such an indorsement does not operate as an assignment of the policy, nor as a contract to insure the interest of the mortgagees, but that they can claim only what the party originally insured is entitled to recover under his contract." The case cites *Fogg v. Middlesex M. F. Ins. Co.*, 10 Cush. 337; *Hale v. Mechanics' Ins. Co.*, 6 Gray, 169, and *Loring v. Manufacturers' Ins. Co.*, 8 Gray, 28. *Bergson v. Builders' Ins. Co.*, 38 Cal. 541, involves the essential facts and the principles that should govern in this case. The non-liability of the company was held because of a failure to pay the premium. The policy had been assigned, and contained a receipt for the premium. After the assignment the company gave notice to the assured that, if the premium was not paid by a certain day, the policy would be canceled, which was done. The case, in harmony with other cases, marks a distinction between those involving an assignment of the property insured and an assignment of the policy. In case of a mere assignment of the policy the case says: "The assignee cannot claim any benefit from the fact that he is a *bona fide* holder without notice." The notice referred to must have been that of the non-payment of the premium for which the policy contained a receipt. Such are the facts upon which the estoppel is claimed in this case. In *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391, the policy had issued to one McCarty with the clause: "Loss, if any, payable to Seth Grosvenor, mortgagee." Afterwards McCarty, in

violation of the terms of the policy, transferred the property so as to defeat the policy as to him. As to Grosvenor the court says: "The mortgagor must sustain a loss for what the insurers are liable before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive the payment, that is recoverable from the insurers." In *Carpenter v. Providence W. Ins. Co.*, 16 Pet. 495, speaking of the assignment of a policy the court says: "The rights of the assignee under the policy cannot be more extensive than the rights of the assignor." Many other authorities are of like import. The appellee cites some cases as holding a contrary doctrine, but we think, when carefully examined, they do not. We notice two on which we think most reliance is placed. In *Basch v. Humboldt M. F. & M. Ins. Co.*, 35 N. J. Law, 429, the policy was sent to the agent of the company containing a clause that "the policy is to have no effect until the premium shall have been paid." The agent delivered the policy to the assured with the understanding that the premium, with other premiums, should be paid. The case holds that evidence to show that the premium was not paid was incompetent, and contradicting the receipt in the policy, and the court, by BEASLEY, C. J., says: "I think when the assured received this policy he had a right to presume either that the agent had settled the premiums with the company, or that they by their receipt intended to relinquish the clause requiring payment." The record in that case does not show that the company, in sending the policy to the agent, required a payment, and from the record that court regarded the facts sufficient to justify the assured in assuming that the payment had been made by the agent of the company or waived. In this case Moore in receiving the policy acted directly with the company,

and he knew that its delivery was conditional upon his promise to remit the premium. The policy was retained, if the premium was not paid, in plain violation of the understanding of the parties, and there is no ground whatever for assuming either a payment or a waiver, as held in the New Jersey case. In *Home Ins. Co. v. Gilman*, 112 Ind. 7; 13 N. E. Rep. 118, the company sought to escape liability because of non-payment of the premium, when the facts were that the assured gave to the agent of the company a credit for which the agent agreed to pay the premiums, and "transmitted the amount of the premium to the company in due course." The case holds that, "for all that appears, the assured was fully justified in presuming that the agent was authorized to make the arrangement disclosed." While the state of the law on this subject is somewhat confused by a statement in some cases of abstract rules, we have found no case in which the party designated in a policy to which the loss, if any, is made payable, whether he be designated an assignee or an appointee to receive the money (both of such terms being employed in the case), is entitled to recover where, under the facts, the assured could not. The language under which the payment can be claimed and the authorities lead to the conclusion that the rights of such a party depend on the liability of the company to the assured. Such a liability being established the payment is to be made to the party designated to receive it. If this premium has not been paid the case as to Moore is this: The company, relying on his promise to pay the premium on receipt of the policy, sent it to him. No credit was intended, nor had the company reason to suppose he would wrongfully deliver it to others. Properly speaking it was not a delivery to Moore, because not intended as such without the payment. The case is not different in principle from what it would be if Moore had been

present at the office of the company, and the policy had been handed to him with the intent that the premium would then be paid, and he wrongfully detained it without payment. We believe no case has or will hold that with such facts the company would be estopped to deny and prove non-payment of the premium. If not estopped as to Moore it would not be as to the person entitled to receive the loss, if any, in his stead. If not estopped it must follow that the testimony was admissible to show the fact of non-payment, and that the court erred in excluding it.

Believing that this discussion of the case will be a sufficient guide on another trial other questions need not be considered. The judgment is REVERSED.

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## MARY ETTER, Appellee, v. JAMES O'NEIL *et al.*, Appellants.

1. **Practice:** BILL OF EXCEPTIONS: TIME OF FILING. Where motions for a new trial and in arrest of judgment were properly filed in a cause, but, by reason of the expiration of the term before the same could be heard, they were not heard and determined until the next succeeding term of court, when, being overruled, the moving party was given sixty days thereafter within which to file a bill of exceptions, and the bill was filed within the time allowed, *held*, that the bill was not invalid because no extension of time was granted by the court at the trial term for filing the same.

2. ———: APPOINTMENT OF SHORTHAND REPORTER: JUDGE'S CERTIFICATE TO EVIDENCE. Where the shorthand reporter who took down the evidence in a cause was not regularly appointed by the court, but was recognized by the judge thereof by the latter's certificate to the evidence, *held*, that such certificate could not be invalidated by a subsequent certificate of the judge to the effect that no formal appointment of the reporter had been made.

3. **Conversion:** LANDLORD'S ATTACHMENT: USE OF PROPERTY PENDING ATTACHMENT PROCEEDINGS. Where, under a landlord's attachment, a sheriff levied upon the furniture and effects of the lessees of a hotel building, and, instead of removing said property, took a receipt therefor of one D., who, as agent for the owner of the hotel, kept the same open, and used the attached property for about sixty days, when it was sold under the attachment, *held*, that in the absence of evidence

of any damage to the furniture by reason of its use pending the attachment proceedings, and it appearing that its removal from the hotel would have been attended with great expense, and with damage to the property, a judgment against the sheriff and the agent, D., for the conversion of the attached property was erroneous.

*Appeal from Council Bluffs Superior Court.*—HON. J. E. F. MCGEE, Judge.

SATURDAY, OCTOBER 24, 1891.

ACTION at law to recover damages for an alleged unlawful seizure and conversion of certain personal property. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendants appeal.—*Reversed.*

*Sims & Saunders* and *Walter I. Smith*, for appellants.

*Ambrose & Duffie*, *E. E. Aylesworth* and *Mynster, Lindt & Seabrook*, for appellee.

ROTHROCK, J.—I. The appellee presented a motion to strike from the record the bill of exceptions made and filed in the case. It appears from the record that the case was tried at the March term, 1890, of the superior court, which term was finally adjourned on the second day of May, 1890. A motion for a new trial and in arrest of judgment was filed during the term. These motions were not disposed of at that term. The arguments on the motions in arrest of judgment and for a new trial were made, and the motions submitted on the twelfth day of May, 1890, which was during the May term of said court; and the motions were taken under advisement, and, by agreement of the parties, either party was to have sixty days from the date of ruling on said motion within which to settle and file bill of exceptions. The motions were overruled on the sixth day of

1. PRACTICE: bill of exceptions: time of filing.

June, 1890, and a judgment was entered on the same day, and the defendants were allowed sixty days from June 6 to settle and file a bill of exceptions. The bill was filed within that time. It is claimed that the bill of exceptions is improperly in the record, because no order was entered of record at the March term extending the time for filing a bill of exceptions beyond the term. The objection is absolutely without merit. The hearing of the motions in arrest and for a new trial were continued by operation of law from the March to the May term. They were heard at the May term, and overruled, and the agreement made that sixty days should be allowed for filing a bill of exceptions. It was not known that the defendants would desire a bill of exceptions until the motions in arrest and for a new trial were overruled.

Another objection to the bill of exceptions is that the shorthand reporter who took down the evidence was not regularly appointed as such reporter by the judge. The certificates made by the judge recognized the reporter as the official reporter of the court. But, in a certificate taken from him by the appellee in aid of the motion to strike the bill of exceptions, it appears that no formal appointment of the reporter was made by the judge. We cannot recognize this last certificate. The appellee ought not to be allowed to use this certificate to aid in the defeat of an appeal to this court. Besides, the reporter was *de facto* an officer of the court, and that was sufficient. The motion is overruled.

II. It appears from the record that the defendant Stout is the owner of a hotel at Council Bluffs, known as the "Ogden." He is not a resident of that place, and his hotel was leased and operated by tenants. The defendant Dooley was his resident agent, who looked

2. ——: appointment of shorthand reporter: judge's certificate to evidence.

after his interests in his absence. The lease was originally made to Davenport & Hunt for a term of five years from March, 1888. A transfer was made of said lease to Winters & Milligan, and in May, 1889, the last-named parties transferred the lease to Etter & Pierce. The defendant Stout concurred in these transfers. The tenants owned the hotel furniture, and in the respective transfers the incoming tenants purchased the said furniture. Etter & Pierce kept the hotel open for guests until October 22, 1889. There was at that time about fourteen hundred dollars of rent in arrears, and the defendant Dooley, acting for the defendant Stout, commenced an action for the rent, and procured a landlord's attachment to issue. The defendant O'Neil was sheriff, and when the attachment came into his hands he went to the hotel, and attached the furniture by making a levy thereon. This furniture consisted of carpets on the rooms in the house, and beds, bedsteads, dining-room and kitchen furniture, and other furnishings usually found in an hotel. When the sheriff went to the hotel to make the levy, Pierce, one of the members of the firm of Etter & Pierce, had abandoned the hotel, and made some sort of transfer to his copartner Etter, who was in possession when the sheriff served the writ, or soon thereafter. The said Etter took the books from the office, and what money there was in the office drawer, and left the house. It appears that the house had been kept at a loss. The levy on the furniture was made at about two o'clock in the afternoon, and before Etter left he advised the guests that the house was in the hands of the sheriff, and he made no preparations for furnishing the next meal. He went over the Missouri river to Omaha, and procured the services of an attorney, and returned to the hotel in the evening. A demand was made on the sheriff to remove the attached property from the hotel. An interview was had by Etter and his lawyer with

Dooley at the hotel, in which a similar demand was made, and Etter or his attorney laid a key on the table, with the declaration that Etter surrendered the possession of the house to the owner. There is no evidence that Dooley assented to this alleged surrender of the lease and possession. The sheriff made efforts to procure a place to store the furniture, but was unsuccessful, and he took a receipt for the same from Dooley, in which it was recited that Dooley was to hold the said property for the sheriff, and return it to him when demanded, or when required in the said attachment suit. Dooley kept the house open for guests, and the furniture was used in the hotel in the ordinary way, until the twenty-fifth day of January, 1890, when it was duly and legally sold by the sheriff at public sale under said writ of attachment. It also appears that a removal of the furniture from the house, and the storage of it in a warehouse or other storeroom, would have greatly damaged it and diminished its value, and that it would have been attended with great expense and loss. No charge was made by Dooley for the storage of said property in the hotel. After the levy was made, Etter assigned his interest in the matter to Mary Etter, the plaintiff, who is his wife.

III. We have given a general statement of facts, which are really not in dispute. This action was brought in about one month after the levy was made, and it is claimed by the plaintiff that the seizure of the goods under the writ was wrongful, and without any authority therefor, and that the defendants then and there wrongfully converted said property to their own use. The issue thus presented was whether the seizure of the property and the failure to remove it from the hotel was a wrongful conversion. There is no claim made anywhere in the record that the levy of the attachment was wrongful, except the

3. CONVERSION: landlord's attachment: use of property pending attachment proceedings.

averment in the petition; and there is no evidence that any of the defendants at any time intended to do more than execute the writ of attachment. The fact is that the sheriff's sale of the property was so far as it appears in all respects lawful and regular. There is no evidence that any damage resulted to the property by allowing it to remain in the hotel for the period of about sixty days between the levy and the sale, and the defendants offered evidence as to the investigation made by the sheriff as to the probable expense that would necessarily have been incurred if he had been obliged to tear up the carpets, take down the bedsteads, and pack up the beds, bedding and other property, and find a warehouse, and store the goods therein pending the litigation. For some reason the court held that evidence of this kind was incompetent. How this ruling could have been made in the face of the fact, standing out all through the record, that the levy of the attachment was rightful, is more than we can understand. It was surely competent for the officer to show his good faith and want of intention to convert the goods to his own use.

The case then involves the single question, did the use of the goods in the hotel, as they were used, amount to a conversion by the defendants? As we have said, there is no evidence of any damage to the furniture. The property was rightfully seized by the officer, and the ordinary use of it does not appear to have been any damage to the plaintiff. For aught that appears, it was better preserved, and a saving of expense, to leave it in the hotel rather than to remove it and put it in a storehouse. If so, the plaintiff suffered no damage. We think that no authority can be found holding that, under these facts, the officer should pay to the attachment defendant the value of the goods, and we are not inclined to adopt and promulgate any such doctrine.

We must decline to follow counsel, and discuss the points of their argument, and the specific objections made to the rulings of the court. We think that there should have been but one instruction given by the court to the jury, and that should have directed a verdict for the defendants. REVERSED.

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# THE STATE OF IOWA *et al.*, Appellants, v. D. A. FARRELL *et al.*, Appellees.

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1. **Criminal Law**: DEPOSITS IN LIEU OF BAIL: PAYMENT TO SHERIFF: LIMITATION OF ACTIONS. An agreement by a sheriff to accept a sum of money in lieu of bail from a prisoner in his custody, and deposit the same with the clerk of the district court, is invalid, and no right of action can accrue thereon to either the state or county for the recovery of said money.

2. ———: ———: ———: ———. An action on behalf of the state or county to recover such sum of the sheriff for the benefit of the school fund will be barred in three years if the money was received by the defendant in the capacity of sheriff, or if paid to him as a private person, under agreement to hold it for the benefit of the state and county, it would be barred in five years.

*Appeal from Mills District Court.*—HON. H. E. DEEMER, Judge.

SATURDAY, OCTOBER 24, 1891.

ACTION to recover a sum of money alleged to have been paid to secure the appearance of a person held to bail on a criminal charge to await the action of the grand jury. Demurrers to the petition were sustained, and judgments for costs were rendered in favor of defendants. The plaintiffs appeal.—*Affirmed.*

*E. B. Woodruff*, County Attorney, for appellants.

*P. P. Kelley*, for appellees.

ROBINSON, J.—The defendant Farrell was elected sheriff of Mills county for the term which commenced in January, 1884, and duly qualified for and entered upon the discharge of the duties of the office. His codefendants were sureties on his official bond. The petition shows that in the month of February, 1884, Farrell had in his custody as sheriff one Charles Mull, who had been ordered by a magistrate to be held on a criminal charge to await the action of the grand jury of Mills county at the term of court which commenced in March, 1884. Mull had been admitted to bail in the sum of two hundred and fifty dollars. No bond was given, but money to the amount named was paid to Farrell by one Dailey, to be held in lieu of a bond, and Mull was released. He was indicted by the grand jury of Mills county at the March, 1884, term of the district court, but failed to appear at that term, and has never appeared since. At the term at which he was indicted the district court declared his bond forfeited. No bond had been given. The money was paid to Farrell for the purpose of having him deposit it with the clerk of the district court, but he failed to make the deposit, and has never paid the money to the clerk or to the county of Mills. This action is brought for the benefit of the school fund, in the name of the state and of the county, to recover the money paid to Farrell. The petition in different counts charges Farrell with liability as an officer, and also in an unofficial capacity. The first count alleges that the money was received by Farrell, as sheriff, as security for the appearance of Mull at the term of court to which he was held to appear, and demands judgment therefor against him and his bondsmen. The second count alleges that

1. CRIMINAL law deposits in lieu of bail: payment to sheriff: limitation of actions.

Farrell received the money for the purpose of depositing it with the clerk; that he received it in trust for the plaintiffs, to be deposited as aforesaid; that when he received it he was an officer of the court; that it was his duty to pay the money into the treasury of Mills county for the benefit of the school fund, and that he has repeatedly promised to make such payment. An order is asked requiring him to deposit the money, with interest, in the hands of the clerk. Also to pay it to the treasurer of Mills county. Judgment for the amount is also demanded. The third count alleges that in February, 1884, Dailey deposited with Farrell the money in question, and that the latter then promised to pay it to the plaintiffs for the use of the school fund; that the money is not paid, and is now held by Farrell, for the use of the plaintiffs. The fourth count charges that Dailey deposited the money in question with Farrell, who agreed to deposit it with the clerk for the use and benefit of the plaintiffs; that the money was set apart and appropriated by Dailey for the use and benefit of the plaintiffs for the use of the school fund; that it was deposited with Farrell for the use of the plaintiffs, whether it was deposited with the clerk or not; and that it now belongs to plaintiffs. The fifth count contains a repetition of much that is stated in the other counts, and, in addition, alleges that by virtue of the agreement between Farrell and Dailey the former was not to hold the money for the latter, nor was he to hold the same for his own use, but that it was set apart and appropriated for the use and benefit of the plaintiffs. The grounds of the demurrer are numerous, and need not be specially mentioned. It is enough to say that the demurrers sufficiently present the questions upon which the case must be decided.

Section 4589 of the Code provides that "the defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the clerk

of the attached property pending the attachment proceeding, even though such depreciation be due to the negligence of the sheriff in not properly caring for the property while in his hands. [GIVEN, J., *dissenting*.]

*Appeal from Van Buren District Court.*—HON. H. C. TRAVERSE, Judge.

SATURDAY, OCTOBER 24, 1891.

ACTION aided by attachment to recover a balance alleged to be due on account for merchandise sold. The defendants denied indebtedness, and pleaded a counterclaim for the alleged wrongful suing out of the attachment. There was a trial by jury, and a verdict and judgment in favor of the defendants. The plaintiffs appeal.—*Reversed.*

*C. L. Poor* and *Sloan, Work & Brown*, for appellants.

*Robert H. Starr* and *McCord & Johnston*, for appellees.

ROBINSON, J.—I. The petition alleges that the defendants are indebted to the plaintiffs in the sum of two hundred and ninety-three dollars and eighty-eight cents, upon an account for merchandise sold and delivered by the plaintiffs to the defendants between the first day of January, 1885, and the fifth day of August, 1888. A statement of account is attached to and made a part of the petition, which shows a balance due the plaintiffs on the eleventh day of June, 1888, of sixty-three dollars and forty-three cents, and numerous articles of merchandise sold on that and other later dates, to the fourth day of the next August. The balance and prices of merchandise sold amounted to the sum for which judgment is

1. ACTION on account stated: evasive answer: evidence: instructions to jury.

demanded. The answer admits the purchase from the plaintiffs of bills of merchandise, but states that the defendants are now unable to state or set out an itemized account. There is no other denial of the sale of merchandise alleged in the petition. The answer also states that since the first day of January, 1885, the defendants have paid to the plaintiffs on the account in suit, at different times, large sums of money, the amounts and dates of payment of which the defendants are unable to state. The answer further states that the defendants had given to the plaintiffs, to be held as collateral security, notes for six hundred dollars, with a chattel mortgage to secure them on a certain stock of general merchandise; that the mortgage had been foreclosed, and the indebtedness of the defendants to the plaintiffs fully paid from the proceeds; and all indebtedness from the former to the latter is fully denied. The answer, by way of counterclaim, alleges that the attachment was sued out wrongfully and maliciously, and judgment is demanded on the attachment bond for the sum of six hundred dollars. On the trial all claim for maliciously suing out the attachment was waived. The plaintiffs in their reply admit the making of the notes, but claim that credit for their amount was given the defendants on the day they were made, to-wit, on the eighteenth day of November, 1885. The writ of attachment was issued on the second day of November, 1888; and on the same day was levied upon the stock of merchandise of the defendants, a part of which was included in the chattel mortgage. The sheriff also had in his hands the mortgage, which he proceeded to foreclose, selling enough of the merchandise thereunder to pay the notes secured by the mortgage, which then amounted to seven hundred and forty-four dollars. The remainder of the attached goods was held until about the month of July, 1889, when it was sold for two hundred and twenty-five

dollars. The defendants claim that the attached goods left after the mortgage sale were worth about nine hundred dollars, and that they have been damaged in a sum equal to the difference between their value as stated and the amount for which they were sold by reason of the attachment.

When the cause came on for trial, each party demanded the right to open and close the case. The court was unable to determine, from an inspection of the pleadings, upon whom was the burden of proof, and, therefore, asked the defendants if they claimed to have made any payment prior to June 11, 1888, for which credit was not given, and was answered in the affirmative. The court then asked the defendants if they admitted that on the date named they owed the plaintiffs a bill for sixty-three dollars and forty-three cents, and was answered in the negative. Thereupon it awarded the opening and closing of the case to the plaintiffs.

On the trial, to prove their claims, the plaintiffs introduced certain statements of account. No objections seem to have been made to the form of the proof, but the plaintiffs were interrogated closely in regard to its correctness. They also offered evidence to the effect that on a former trial an attorney for the defendants had admitted that the debit side of the account was unquestioned, but that their claims were for credits not given. The attorney, who it was said made the admission, denied it as a witness, and the alleged admission was made somewhat prominent as an issue. But the account of the plaintiffs, so far as it related to merchandise sold and delivered, was not otherwise disputed on the trial. On the contrary, the defendant W. M. Tharp, who is the principal, if not the only real defendant, testified: "If I had thought the credit was all right, there would have been no differences in our accounts. I thought the difference was all on the credit

account. We did find afterwards that we had been charged with goods that we never got,—a load of salt. It does not appear in this account. I think it was taken out, and we have nothing to do with it." That being the condition of the case, the court charged the jury as follows:

"3 1-2. At the commencement of this trial each party claimed that they were entitled to open and close the case, on the alleged ground that the burden of the proof in the first instance rested on them. The court awarded the opening and closing to the plaintiffs. I shall not now stop to inquire whether the court's action in this regard was right or wrong. The case has been tried on that theory, and the plaintiffs have had the benefit of their claim. Hence, you are instructed that, under the circumstances, the burden of proof is on the plaintiffs to establish, by the weight of the evidence, their account; that is, the debit side of their account. The plaintiffs claim that on a former trial counsel for the defendant, in the presence of the defendant, admitted the correctness of the plaintiffs' account as set out in an exhibit that has been introduced in evidence. This is denied by the defendant. The jury will determine where the truth is as to this contention. But you should consider all the evidence in the entire case in determining whether plaintiffs have established their account for goods and merchandise alleged to have been sold defendant. On the present trial, has defendant, while on the witness stand, admitted the correctness of the debit side of plaintiffs' account, or has he failed to deny any portion thereof?"

We think this portion of the charge should not have been given. Its natural and probable effect was to bewilder and mislead the jury as to a matter about which there was, in fact, no dispute. The debit side of the account, as stated in the petition, was not denied in the answer. The defendants may have been unable

to state the amounts of the bills of goods they had purchased, or to set out an itemized account, and yet they may have been entirely satisfied that the statement of account made by the plaintiffs was correct. That began with an alleged balance which, so far as the pleadings show, may have been agreed upon by the parties on some settlement as correct; and in that case it would have been immaterial whether the defendants knew at the time their answer was filed what items of account were considered in reaching that balance. As to that, the answer was evasive, and not in effect a denial of the matter pleaded, nor a denial of knowledge or information of such matter sufficient to form a belief, required by Code, section 2655, subdivision 2. But, had the answer contained a sufficient denial, there was only a seeming conflict in the evidence as to the debit side of the account. Had proof of the account depended upon the alleged admission of the attorney for the defendants, the case would have been different; but that was of no importance whatever, in view of the proof of account given by the plaintiffs, and the admission by Tharp to the effect that it was correct. The fact that the court had decided at the beginning of the trial that the burden of proof was on the plaintiffs was entitled to no weight, for the reason that, if there was any doubt as to the issue presented by the pleadings, there was no room for doubt when the charge was given as to the correctness of the debit side of the account, for it had then been conceded. The paragraph of the charge in question makes prominent the admission in regard to the correctness of the account alleged to have been made on a former trial, although that had become wholly immaterial, and treats as in doubt the correctness of the debit side of the account, and the admission of the defendants in regard to it. It was the duty of the court to instruct the jury plainly that the claim of the plaintiffs in regard to the mer-

chandise sold, including the prices charged, was admitted, and not in dispute. That the jury may well have been confused and misled by the charge, to the prejudice of the plaintiffs, is shown by the condition of the record.

The defendants claim to have made three payments to a traveling agent of the plaintiffs named Riepe, for which credit has not been given. These payments amount in the aggregate to five hundred and seventy-four dollars and seventy-three cents. The plaintiffs and Riepe deny having received them, or any part of them. Aside from the testimony of Tharp, the evidence to show payment is very unsatisfactory, consisting of memoranda as follows: At the bottom of a bill for seventy-three dollars and ninety-six cents is written: "Paid one hundred and seventy-four dollars and five cents, July 25, 1885. R." At the bottom of another bill, dated October 26, 1885, which shows a balance due the plaintiffs of two hundred dollars and sixty-eight cents, is written in pencil: "Received payment. R." At the bottom of another bill, or statement, dated November 6, 1886, which shows an aggregate of five hundred and thirty-six dollars and fifty-seven cents due the plaintiffs, is written in pencil: "Received 200. R." Riepe not only denies that he made or signed these memoranda, but testifies that when the first one is claimed to have been made he was not at the defendants' place of business, but in a distant part of the state; and that on the date of the last bill, and at the time the memorandum thereon is claimed to have been signed, he was not in the employ of the plaintiffs, had not been for nearly four months, and was not at the place where it was said to have been made. Evidence was introduced to show that the memoranda were not in the handwriting of Riepe, and some of the documentary evidence which was introduced for that purpose has been certified to

this court, but we do not find it proper to determine the question thus presented. If the payments in dispute were really made, then it appears that the defendants had overpaid their account to the amount of more than three hundred dollars when this action was commenced; credit being given for the money realized on the foreclosure of the mortgage. No such claim as that was made before this action was brought, the answer does not allege overpayment, and we do not understand that the defendants now claim that they had overpaid the plaintiffs so much, if any, when this action was commenced. But we cannot tell what the jury found in regard to these payments. They may have found that they were not made, yet, if they also found that the plaintiffs had not proven their claim by a preponderance of the evidence, as they seemed by implication authorized to do by the charge of the court, they might for that reason have concluded that the attachment was wrongfully sued out.

II. The plaintiffs asked the court to give an instruction as follows: "9. Even if you find the writ of attachment was wrongfully sued out, you cannot allow any damages to the defendant by reason of loss or depreciation in value of goods through the neglect of the sheriff to properly care for and protect the goods taken under the writ." The instruction was refused, and the jury were charged as follows: "11. If you should find that the writ of attachment in this case was wrongfully sued out, then the measure of defendant's damages on his counterclaim would be the fair cash value in the market of defendant's goods that were levied upon and sold under said writ of attachment, estimated at the time of said levy, with six-per-cent.-per-annum interest thereon from that time to the present. But you should exclude from said estimate any goods sold under the foreclosure of the chattel mortgage, and you must also deduct

2. ATTACHMENT: wrongful levy: bond: damages.

from the sum arrived at any amount in the hands of the sheriff that is ready to be turned over, and that is the proceeds of defendant's goods that were sold under said writ of attachment. * * *"

The appellants complain of these rulings of the court, insisting that in no event are they liable on their attachment bond for any damages which were not the natural and direct result of the wrongful suing out of the writ, and that damages which were caused by the negligence of the sheriff were not the result of suing out the attachment, and are not covered by the bond. Section 2959 of the Code requires the plaintiff, in an action aided by attachment, to give a bond "conditioned that the plaintiff will pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment." Section 2961 provides that, in an action on such bond, "the plaintiff therein may recover if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual amount of damages sustained and reasonable attorney's fees to be fixed by the court."

In this case there is evidence which tends to show that during the time which intervened between the levying of the attachment upon the goods in November, 1888, and their sale eight months later, some of the goods were damaged by mice and moisture. The question presented is whether, if such damages were caused by the negligence of the sheriff, the plaintiffs are liable on their bond, under the provisions of the statute quoted. Those provisions refer in terms to damages which result from the wrongful suing out of the attachment; but it is manifest that they are also designed to include all damages which result from the taking and detention of property under the writ. It is the object of the statute to afford the defendant full indemnity against all damages which may result from

the wrongful issuing of the writ, including that which results from his loss of the possession, use and control of the property taken. In *Campbell v. Chamberlain*, 10 Iowa, 340, it was said that, in an action on an attachment bond, the plaintiff is entitled to recover, as damages, "all losses and expenses incurred by him in making defense to the attachment proceedings, and such losses as he may have sustained by being deprived of the use of the property attached, and any injury thereto by its loss or depreciation in value." See, also, 2 Sutherland on Damages, 59; *Meshke v. Van Doren*, 16 Wis. 324; *Reidhar v. Berger*, 8 B. Mon. 160; *Frankel v. Stern*, 44 Cal. 173; *Fleming v. Bailey*, 44 Miss. 135. In section 175 of Drake on Attachments it is said that actual damages in such cases may properly be comprehended under two heads: *First.* Expense and losses incurred by the party in making his defense to the attachment proceedings; *second*, the loss occasioned by his being deprived of the use of his property during the pendency of the attachment, or by an illegal sale of it, or by injury thereto, or loss or detention thereof." In serving the writ, the sheriff is the agent of the attachment plaintiff, and for many purposes the acts of the officers are, in legal effect, the acts of the plaintiff. *Robinson v. Keith*, 25 Iowa, 321. He is given possession and control of the attached property by the act of the plaintiff, and is to a considerable extent subject to his direction. Although he may be liable to the plaintiff for his negligence, yet we are of the opinion that, as between the plaintiff and the owner of the property, he should be treated as the agent of the former, so far as liability for his negligence is sought to be enforced. There is no good reason for requiring the owner of the property in such a case to split his cause of action, and proceed against the plaintiff for a part, and against the sheriff for the remainder. In practice, it would frequently be difficult, if not impos-

sible, to show what portion of the damages resulted from the negligence of the sheriff, and what from causes for which he was not in any manner responsible; and we do not think it was the intent of the law to impose that burden upon the property-owner. We conclude that the attachment bond is designed to protect him from the negligent performance of duty by the sheriff in caring for the property, as well as from other damages which result from the wrongful suing out of the writ. The charge given by the court expressed the rule of damages applicable to cases of this kind.

Other questions discussed by counsel are not of a character to be likely to arise on another trial, and, therefore, need not be determined. For the error in the charge we have indicated the judgment of the district court is REVERSED.

GIVEN, J. (*dissenting*).—I do not concur in the conclusion "that the attachment bond is designed to protect him [the defendant] from the negligent performance of duty by the sheriff in caring for the property." It is my opinion that such damages are not within the purpose or provisions of the statute or bond. The purpose of the bond is to indemnify against the wrongful act of the plaintiff in suing out the attachment, and does not apply to any other person or act. It secures to the defendant all damages "immediately consequent upon the wrongful act." *Plumb v. Woodmansee*, 34 Iowa, 116. By it he is secured for all damages caused by the detention and depreciation of his property under proper care, for these are consequences that necessarily and immediately follow from suing out the attachment. They are consequences contemplated in the law and by the parties, and within the condition of the bond. That the officer will neglect his duty, and wrongfully permit the property to waste

or depreciate, is not within the contemplation of the law or the parties. It is not a necessary or immediate consequence of suing out the attachment, and may result whether the attachment be rightful or wrongful. Such damages are not even remotely caused by suing out the attachment, but are solely caused by the negligence of the officer. To hold the plaintiff thus liable on his bond is to enlarge its condition beyond that authorized or expressed, and to charge him with the wrongful act of another, which he has not authorized, and which he may be powerless to prevent. Section 2961 of the Code does not enlarge the damages to be recovered under section 2959. Taken together, it is the actual damage sustained by reason of the wrongful suing out of the attachment. In my view, none of the authorities cited in the opinion are against my conclusions. The loss or depreciation mentioned is such as is immediately consequent upon the wrongful suing out of the attachment, and not upon some other and different wrong. The theory of the opinion, as I understand it, is that the officer holds possession as agent for the plaintiff, who, therefore, is liable for his wrong. Grant it, and yet that liability is not upon the bond, unless it is within its conditions; and, as I maintain, this bond is not so conditioned. The possession of the officer is, for all the purposes of the writ, the possession of the plaintiff, because, by placing the writ in his hands, the plaintiff has authorized the detention of the property; and, hence, is liable for its detention and depreciation, under proper care. The plaintiff does not, however, authorize the officer to neglect his duty, and to wrongfully allow the property to waste or depreciate. *Robinson v. Keith*, 25 Iowa, 322, does not support the position that plaintiff is liable for such wrongful act of the officer. The remedy in such case is against the officer who, without sanction or authority, commits the wrong.

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# JOSEPH MOLL, Appellant, v. M. MCCAULEY, Appellee.

**Easements**: DEED: CONSTRUCTION. Where upon the same day with a conveyance of certain real estate the grantor granted to the grantee' "his heirs and assigns" and "tenants and occupiers" the right to pass over a certain strip of land adjoining the premises conveyed "from time to time, and at all times forever hereafter," *held*, that the right of way was appurtenant to the premises conveyed, and passed with a subsequent conveyance of said premises which described said property by metes and bounds, and contained no reference to said right of way.

*Appeal from Linn District Court.*—HON. J. H. PRESTON, Judge.

SATURDAY, OCTOBER 24, 1891.

ACTION to establish an easement as appurtenant to land owned by the plaintiff. Judgment dismissing the plaintiff's petition, and he appeals.—*Reversed.*

*A. R. West* and *Rickel & Crocker*, for appellant.

*W. G. Thomson* and *J. J. Powell*, for appellee.

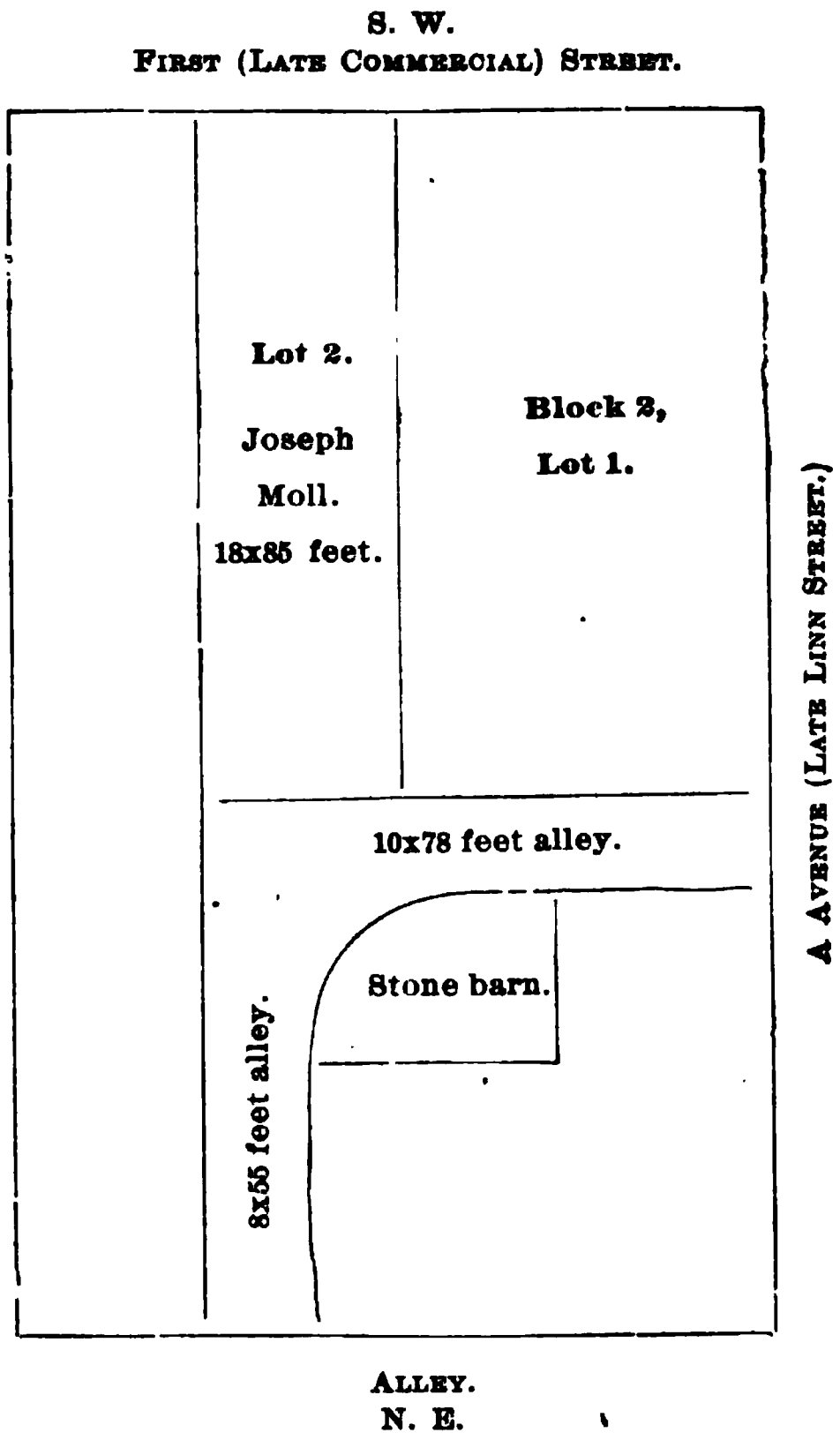
GRANGER, J.—In November, 1861, Stephen L. Pollock conveyed to Thomas Young a part of lot 2, in block 2, in Cedar Rapids, Iowa. To afford access to the lot from the rear, another instrument was executed on the same day by Pollock and wife, with the following provisions:

"*Know all Men by These Presents:* That we, Stephen L. Pollock and Marilla Pollock, his wife, of the county of Linn, in the state of Iowa, for and in consideration of the sum of ten dollars in hand paid by Thomas Young, of the county of Benton, in the state of Iowa, do hereby covenant and grant to and

with the said Thomas Young, his heirs and assigns, that it shall be lawful for the said Thomas Young, his heirs and assigns, and their agents and servants, and the tenants and occupiers for the time being of that part of lot two (2), in block number two (2), in the city of Cedar Rapids, agreeably to the recorded plat of said city, this day sold by the said Stephen L. Pollock to the said Thomas Young by deed bearing even date herewith, from time to time and at all times forever hereafter, and at his and their respective will and pleasure, by night and by day, and for all purposes to pass and repass in any manner whatsoever through and over a certain alley lately formed by the said Stephen L. Pollock, and described as follows, to-wit: Commencing at a point eighty-five (85) feet from Commercial street, and then ten (10) feet from the line of lot one (1) in block two (2), in the said city of Cedar Rapids; thence running parallel with said Commercial street eight (8) feet; thence fifty-five (55) feet through the rear of said lot two (2) to the alley; thence eight (8) feet on the line of said alley and towards Linn street; and thence fifty-five (55) feet parallel with the line of said lot one (1) to the place of beginning. And it shall be lawful for the said Thomas Young to repair and amend the same as there shall be occasion."

By two mesne conveyances the plaintiff became the owner of the part of lot 2 conveyed to Young by Pollock, but none of such conveyances contain any reference to the easement conveyed by Pollock to Young, and the part of lot 2 is in each case described by metes and bounds. The easement afforded access to the plaintiff's lot from the alley in the rear; and, prior to an interruption by the defendant, some two years since, the alley had been open and used since the conveyance to Young; and most of the time there had also been an alley at right angles with this ease-

ment to a street known as "A avenue." The following diagram will indicate the situation clearly:




Lots 1 and 2 extend from First street to the alley. The round corner at the stone barn was for convenience in turning, and made so by Pollock, who, before conveying the same, owned lots 1 and 2. In January, 1864, Pollock conveyed the part of lots 1 and 2 on which is situated the stone barn and the alley-way "ten by seventy-eight feet," leading to A avenue (formerly Linn street) to William Stewart, and Stewart conveyed the same to the defendant October 6, 1886. On the same day Stewart and wife executed to the defendant a quitclaim deed of the right of way or

easement in question, and in November, 1887, Thomas Young and wife made to the defendant a quitclaim deed of the easement or right of way. These conveyances constitute the basis of the defendant's right to what was the easement in question.

The plaintiff urges the maintenance of the alley-way upon several grounds: *First.* That it is by the conveyance to Young appurtenant to the lot owned by him; *second*, that it has been dedicated to the public; and, *third*, that the public has obtained a right thereto by prescription. We think the claim of the plaintiff that it is appurtenant to the lot owned by him must be sustained. It is difficult to imagine a conveyance more conclusively indicating such a purpose than the one in question when considered in connection with the conveyance of the lot on the same day.

It is said that the easement created thereby was a mere "personal right" to Young, and, hence, was not appurtenant to the premises. The conveyance in terms shows that Pollock had in some way before formed that strip of land into an alley, and that his intention by the conveyance was that it should be for use, not of Young and his family, independent of his ownership of lot 2, but as the purchaser and owner thereof, and to his heirs and assigns, and to the tenants and occupiers thereof, "at all times forever" thereafter. The language is not in harmony with a mere personal right, but, on the other hand, it has direct reference to a use of the alley by whomsoever should occupy the lot. At the time of granting this easement the lot to which we regard it as appurtenant was not improved, and was not thereafter by Young, but was by him granted, and the alley was enjoyed as appurtenant to the lot for twenty-five years or more until the quitclaim deeds by Stewart and Young to the defendant. Nothing in the record indicates to us that the alley right was designed to be personal only.

It is urged because of the fact that the conveyance from Young to the plaintiff described the premises by metes and bounds, without including the right of way or easement, that it does not pass as appurtenant under a rule that a right of way does not so pass unless the grantor in the conveyance uses language sufficient to create an easement anew, or because it is absolutely necessary to the enjoyment of the premises, and authorities are cited to support the rule. We are not disposed to disturb the general rule that in grants by metes and bounds easements do so pass,but the rule is to be applied within its spirit, and not upon such a technical construction or application as to defeat the real intent of the parties, and do injustice. We attach great importance to the fact that the conveyance of the lot and the easement were transactions between the same parties on the same day, and in a way to justify a conclusion that the easement was intended as an appurtenance to the lot. To our minds the record of the conveyances warranted a purchaser of the lot in the belief that to purchase the lot would give the right of access to and from the same by the alley-way in question, and a mere description of the lot by metes and bounds would not operate to divest the property of the appurtenance. We think it belonged to the estate, and passed by implication. It comes within the rule stated in *Philbrick v. Ewing*, 97 Mass. 134. "It actually belonged to the estate conveyed;" and in such a case it passes without being "expressly described in the conveyance." The case of *Decorah Woolen Mill Co. v. Greer*, 58 Iowa, 86, is not opposed to this holding, for in this case the easement or right of way has for many years been used,—"exercised." We find no authority with a like state of facts to justify the judgment of the district court.

The plaintiff should have a decree with nominal damages. REVERSED.

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# ROBERT P. YOUNG, Appellee, v. RIGHT REV. HENRY COSGROVE *et al.*, Appellants.

1. **Deeds: PLAT: CONSTRUCTION.** Where a deed conveyed lots numbered 1, 2, 3 and 4 in a block named, which were all of the lots included in said block, and subsequently by a new plat of said lots and other property a lot numbered 5, and a strip of land fifty feet wide without number, was added to the block in which the lots aforesaid were located, *held*, that the grantees under said deed acquired no interest in the strip of land added to said block, and not designated by any lot number.

2. ———: ———: **VALIDITY.** The invalidity of a plat filed of record as to certain real estate will not affect the title to real estate conveyed with reference to the subdivisions designated therein, nor to its use for the purpose of ascertaining the property intended to be conveyed.

*Appeal from Pottawattamie District Court.*—HON. H. E. DEEMER, Judge.

MONDAY, OCTOBER 26, 1891.

ACTION to quiet the title of certain city lots in the plaintiff against the claim of the defendants. There was a decree granting the relief prayed for by the plaintiff. The defendants appeal.—*Affirmed.*

*Finley Burke, George W. Hewitt* and *W. H. Ware*, for appellants.

*D. C. Bloomer* and *Harl & McCabe*, for appellee.

BECK, C. J.—I. The facts of the case relating to the conflicting claims of the parties to the real estate in controversy, generally stated, are as follows: The lots in controversy are in Bayless' addition to the city of Council Bluffs, which was made before the land was purchased of the government, as was also a conveyance to the defendants' grantors for the lots. The county judge, under authority of law, acquired the land of the government.

1. DEEDS: plat: construction.

for the purpose of securing it as a part of the town site. He conveyed the lots, or a part of them, by the description of the plat to the defendants' grantors. The lots in question claimed by the defendants, four in number, constituted a block, and were described and designated in the plat as lots 1, 2, 3 and 4, in block 15. The defendants' grantors, as we have just said, acquired title to these lots by deeds describing them as they are designated on the plat. Subsequently another plat of the addition was filed covering the same and other land, and showing another lot, number 5, in block 15, and a strip of land fifty feet wide, not designated by a number. After the second plat was filed, lot 5, added to block 15, by that plat, was conveyed to the plaintiff's grantors.

II. The defendants claim that the fifty feet in block 15, not designated by a number, should be apportioned between all of the owners in the block, while the plaintiff insists that the defendants' lots are fixed and determined by the first plat, and that they hold no interest, right or title, except to the lots 1, 2, 3 and 4, as designated in the plat. In our opinion, the plaintiff's claim is correct, and the defendants have no title, right or interest in any part of the block, except lots 1, 2, 3 and 4, as designated by the first plat. This position is supported upon the obvious reason that the conveyances to the defendants' grantors by using the description of the plat then in existence adopted the descriptions of that plat, which thus became, in effect, a part of the conveyance. The defendants thus acquired title only to lots 1, 2, 3 and 4, which are of the dimensions as shown by the plat.

III. It is said that the first plat is invalid, not having been made and filed in accord with the law.

2. ——: ——: validity. We need not inquire whether this position be correct. The holder of the title to the land recognized the plat by following its descriptions,

and thus, as between himself and his grantee, adopted it. Surely, when an instrument is referred to to designate land or give description thereof, we are not required to hold such an instrument valid and regular in order to accept the description it gives. A void deed or a void plat could well describe lands which could be properly and conveniently referred to for such description in deeds conveying them.

These views upon this point dispose of the case, and render unnecessary the consideration of the able, acute and extended argument of counsel upon other branches of the case. The judgment of the district court is AFFIRMED.

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## SMITH & Co.; Appellees, v. JAMES A. HILL, Appellant.

1. **Practice in Supreme Court:** ASSIGNMENT OF ERRORS: RECORD: WAIVER. An objection to the record in a cause in the supreme court, upon the ground that no assignment of errors has been made and filed by the appellant, will be deemed waived where the objection is not raised until after the cause has been fully argued, and then without notice to the appellant, and a cause will not be dismissed for such reason by the court on its own motion, where the record contains but a single question for determination.

2. **Property Exempt from Execution:** INVESTMENT OF PENSION MONEY: SUBSEQUENT EXCHANGE OF PROPERTY. Where property purchased wholly with pension money was exchanged by the pensioner for other property of greater value, but without the investment of any additional sum of money, *held*, that the property so received was not subject to execution to the extent of its excess in value over the property given in exchange.

*Appeal from Hamilton District Court.*—HON. JOHN L. STEVENS, Judge.

MONDAY, OCTOBER 26, 1891.

ACTION upon an account for thirty-five dollars. The suit was commenced before a justice of the peace. The plaintiffs procured an attachment to issue, which was levied upon a horse owned by the defendant. The defendant answered, admitting the account, but claimed that the property seized in attachment was exempt because it was purchased with pension money paid to the defendant for services rendered and injuries received while a soldier in the War of the Rebellion. There was a trial of this question before the justice of the peace, and the attached property was ordered to be released. An appeal was taken, and it was held by the district court that the property was not exempt. The defendant appeals.—*Reversed.*

*Hyatt & Hyatt*, for appellant.

*Martin & Wambach*, for appellees.

ROTHROCK, J.—I. On the same day that the cause was finally submitted to this court, and after it had been fully argued, the appellees filed a paper which contained a suggestion that the appellant had not made and filed an assignment of errors. It is not shown that this paper was served on the appellant or on his counsel. If it be regarded as an objection to the record, it comes too late, and, so far as the appellee is concerned, the omission to assign errors will be regarded as waived. *Andrews v. Burdick*, 62 Iowa, 714. It is true it is held in that case that the court may, on its own motion, enforce the statute requiring the assignment of errors though waived by the parties. In most cases appealed to this court, there are numerous questions involved, and in such cases we would have no hesitancy in dismissing the appeal on our own motion,

1. PRACTICE in supreme court: assignment of errors: record: waiver.

if errors are not assigned. But, as the statute, Code, section 3183, merely provides that "the appellee may have the appeal dismissed," unless good cause be shown for a failure to assign errors, we do not feel called upon, on our own motion, to dismiss the appeal in this case. The record contains a single question, and no assignment of error is really necessary to enable the court to determine the very point in issue.

II. The amount in controversy does not exceed one hundred dollars, and the appeal comes to us by a certificate of the trial judge, which is in these words: "It is hereby certified that the following question of law is involved in the decision of the above-entitled cause, upon which it is desirable to have the opinion of the supreme court, viz.: The defendant, James A. Hill, is a pensioner of the United States, and a resident of the state of Iowa, and has been for more than ten years last past. That in the month of January, 1888, he purchased a horse for sixty-five dollars, the entire purchase price of which he paid out of moneys received as such pensioner. Thereafter he made an even exchange of said horse for another, which it is agreed is now, and was at the time of the levy of the attachment in this action, worth one hundred and twenty-five dollars. Is the defendant entitled to the horse last mentioned, as exempt property, under section 4305, McClain's Code, being section 1, chapter 23, of Laws of the Twentieth General Assembly, or has the creditor a right, in an action at law, to have the property sold, and the excess over the amount originally invested by the pensioner subjected to the payment of his debt?"

2. PROPERTY exempt from execution: investment of pension money: subsequent exchange of property.

The section of the Code referred to in the certificate is as follows: "All money received by any person resident of the state as a pension from the United States government, whether the same shall be in the

actual possession of such pensioner, or deposited, loaned or invested by him, shall be exempt from execution or attachment or seizure by or under any legal process whatever, whether such pensioner shall be the head of a family or not." If the defendant had not traded horses, but had kept the one first purchased for sixty-five dollars, and paid for with pension money, the horse would have been exempt. No additional money from any source is invested in the horse in controversy. The whole investment in this horse was pension money. It is true it was not a direct investment. But construing exemption laws liberally, as we always do, we think there should be no partition of this horse between the pensioner and his creditors. The result of such a construction of the statute would be to compel the pensioner to retain the identical horses, cows and other property purchased with his pension money, or to prevent him from investing it in any property. The horse in question is exempt to the extent of the pension money invested in him; and because the pensioner may have made a good trade, and procured a horse worth more than that amount, appears to us to be no reason for ordering the horse to be sold, and the pensioner paid his pension money back, and the balance paid to his credit. It is conceded by the certificate that the money invested in the horse is exempt, but that because he is of more value than the pension money the excess of such value is not exempt. It seems to us this rule would require pensioners to be careful that they did not invest the exempt money in property worth more than the money paid for it. There is nothing in this opinion inconsistent with the case of *Diamond v. Palmer*, 79 Iowa, 578. In that case it was held by a majority of the court that, where a pensioner paid for the services of a stallion with pension money, it gave him an exempt interest in the colts, the dams of the colts being exempt because purchased

with pension money. In the case at bar the horse in question represents pension money, and nothing else. There was not one cent of any other money invested in him. REVERSED.

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DISTRICT TOWNSHIP OF UNION, Appellee, v. J. B. MEYERS, Appellant.

**Schools:** DIRECTORS: SUBDIRECTORS: AUTHORITY: INJUNCTION. A subdirector in a school district has no authority to refuse to use or to allow to be placed in his school an article ordered therefor by the board of directors, upon the ground that the same was purchased contrary to law, or because the same is worthless and a needless expense; and a subdirector so resisting the authority of the board may be restrained from so doing by injunction.

*Appeal from Hardin District Court.*—HON. JOHN L. STEVENS, Judge.

MONDAY, OCTOBER 26, 1891.

*H. L. Huff*, for appellant.

*C. E. Albrook*, for appellee.

GIVEN, J.—I. This case is before us on certificate of the trial judge, that it involves questions of law upon which it is desirable to have the opinion of this court. The questions certified arose upon demurrer to the fifth paragraph of the defendant's answer. The plaintiff, as cause of action, alleges that its board of directors purchased ten sets of Kennedy's mathematical blocks, to be used in the schools of the district; that one set was set apart for use in subdistrict number 1, of which the defendant is subdirector; that the defendant refuses to

allow said blocks to be placed in the school or schoolhouse of said subdistrict, "and threatens with violence anyone who shall attempt to place the same in said school." The plaintiff asks that the defendant be enjoined from interfering with the officers of the plaintiff in placing said blocks in the school, and with the teacher in using the same. The fifth paragraph of the answer alleges that there was no authority given by the electors at any annual meeting to purchase said blocks on credit; that no tax as a contingent fund was voted by the electors preceding said purchase to pay for the same; that there was not at the time of the purchase any unappropriated contingent fund in the treasury sufficient with which to purchase maps, charts, apparatus or the said blocks for the use of the schools; that the purchase was on a credit, making a balance payable June 1, 1890; wherefore, said purchase was without authority of law and void. The defendant also alleges that the blocks are worthless in the schools, a needless expense, and not used by the teacher in said subdistrict number 1; and says that he had good reasons and lawful authority for not putting the blocks in the school.

The questions certified are whether, under the facts as alleged, the defendant, as subdirector of subdistrict number 1, was under legal obligation to place, or allow to be placed, the blocks furnished for that purpose in the school of his subdistrict, and, if so, whether injunction will lie to restrain him from interfering with the officers of the plaintiff district in placing the blocks in said school. The reasons alleged why the appellant is not under such obligation is that the contract of purchase was without authority of law, and that the blocks are worthless in the school. Conceding that the purchase was without authority of law, and the blocks worthless, the inquiry remains whether,

for those reasons, the plaintiff may refuse to allow the blocks to be placed and used in the school. Among the powers conferred by chapter 9, title 12, of the Code, upon the board of directors of district townships is the authority to make all contracts, purchases and payments necessary to carry out any vote of the district; to select sites for schoolhouses, and to determine the number of schools to be taught in each subdistrict, and the time beyond that required by law; to divide districts, and authorize graded or union schools; to order changes in the books used; to visit the schools, and aid the teacher in establishing and enforcing rules; to discharge teachers, dismiss pupils and "make such rules and regulations as may be necessary for the direction and restriction of subdirectors in the discharge of their official duties, and not inconsistent with law." It is manifestly the purpose of chapter 9, title 12, to put the entire control of the schools of district townships into the hands of the board of directors of such townships, subject only to the provisions of law. By reference to sections 1753 and 1756 of the Code, it will be seen that subdirectors, in the exercise of the powers conferred upon them, act in subordination to the board of directors or its president. It is under such rules and restrictions as the board of directors may prescribe that the subdirector may make contracts for fuel, teachers, repairing and furnishing and other provisions necessary for the convenience and prosperity of the schools within his subdistrict, and have the control and management of the schoolhouse, unless otherwise ordered by a vote of the district township meeting. District township boards have undoubted control as to what records, dictionaries, maps, charts and apparatus shall be used in the schools of their district. Code, sec. 1729. A teacher would not be heard to say that any such articles furnished by the board should not be placed nor used in the school, because not purchased

by authority of law. A subdirector, excepting when acting as a member of the board, has no authority to determine what of such articles shall or shall not be used in the school of his subdistrict. The legality of the purchase cannot be questioned in this way; nor is it for the subdirector, acting independently of the board, to determine whether the article is worthless, and a needless expense or not, as it is peculiarly the province of the board to pass upon that subject.

We are of the opinion that the defendant did not have the right, for either of the reasons alleged, to refuse to place the blocks in the school, or to resist the plaintiff's officers in so placing them and requiring them to be used, and that injunction will lie to restrain the appellant from such resistance. The demurrer to the fifth paragraph of the defendant's answer was properly sustained. The judgment of the district court is, therefore, AFFIRMED.

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## P. D. WIGHTMAN, Appellant, v. BUTLER COUNTY, Appellee.

1. **Appeal from Order Granting New Trial:** RECORD: REVIEW. Where upon appeal from an order granting a new trial the record does not disclose upon which of the several grounds stated in the motion therefor the order was based, the supreme court will affirm the action of the trial court, if, as to any one of said grounds, error does not affirmatively appear.

2. ———: CONFLICT OF EVIDENCE. Where in support of a motion for new trial, upon the ground of the misconduct of one of the jury, an affidavit was filed to certain facts, which, if true, warranted the granting of a new trial, and the juryman in question made an affidavit specifically denying the charges made, *held*, that the evidence being conflicting, the finding of the trial court was conclusive.

*Appeal from Floyd District Court.*—HON. J. W. RUDDICK, Judge.

MONDAY, OCTOBER 26, 1891.

ACTION for personal injuries resulting from the negligence of the defendant county to properly maintain a bridge on one of its highways. There was a verdict for the plaintiff, which the court, on motion of the defendant, set aside, and granted a new trial. From the action of the court granting the new trial the plaintiff appeals.—*Affirmed.*

*Gibson & Dawson* and *Ellis & Ellis*, for appellant.

*P. W. Burr*, *O. B. Courtright*, and *F. Lingenfelder*, for appellee.

GRANGER, J.—I. The motion for a new trial was based on assignments that the verdict was contrary to the instructions given; that it was not sustained by the evidence; that the court erred in refusing and admitting evidence, in giving and refusing instructions; and of the misconduct of one of the jurors during the trial. Upon what one or more of these assignments the court based its ruling the record does not inform us. The court merely "sustained said motion, and set aside the verdict of the jury." We can only disturb the action of the court upon an affirmative showing of its error. Its ruling being general, if there is one ground of the motion as to which error does not affirmatively appear, its action must be sustained, for it may have been on that ground that it sustained the motion. The appellant's counsel, with a view evidently to meet the emergency, have discussed the several grounds of the motion for a new trial in the light of the record, urging that it is manifest therefrom that the court in granting the

1. APPEAL from order granting new trial: record: review.

motion exceeded its discretionary power. A consideration of one of the grounds of the motion will be sufficient for a proper determination of the case here.

II. The affidavit of one E. P. Fox was filed in support of the motion for a new trial, in which it appears that during the progress of the trial, and while the court had adjourned for dinner, he entered a billiard saloon, and the only person there was one of the jurors, whom he then did not know, but supposed him to be the proprietor of the saloon; that he there entered into a discussion with him as to the merits of the case on trial; that, after they had "discussed and argued the merits of the case," the juror informed him who he was; "that he had made up his mind how he should decide it, and that the lawyers could not change him;" but it further appears that at that time the evidence for the defense had not closed, and no part of the rebutting evidence had been introduced. In resistance of the motion the affidavit of the juror was filed, in which it is stated that the statements in the affidavit of Fox, in so far as they relate to a talk or conversation with him, are "wholly false;" that he had no talk whatever with Fox in the billiard hall, and never discussed or argued the merits of the case with him, and never told him he had made up his mind how he should decide the case, or that the lawyers could not change him. These affidavits constitute all the evidence for and against the motion. It is not urged to us but that, if the statements in the affidavits of Fox are true, the district court could properly grant a new trial for that reason; but it is urged that the court could not "reasonably so hold." The evidence is clearly conflicting. The juror surely had as strong motives to falsify as did the witness Fox. There is no rule in such a case in a law proceeding upon which we can determine the facts against the findings by the district court. If the ruling

2. —: conflict of evidence.

of the court below was upon this ground of the motion, which we may assume in support of its judgment, there is no theory of the law upon which we can or should disturb its action. The evidence is such that its findings of fact for either party under the issue would conclude us.

With this view, error does not affirmatively appear, and the order of the district court must be AFFIRMED.

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## FAYETTE COUNTY, Appellee, v. H. P. HANCOCK, Guardian, Appellant.

1. **Property Exempt from Execution**: PENSION MONEY: SUPPORT OF INSANE. Pension money in the hands of a guardian of the estate of an insane person, which was received from the United States after chapter 23 of Acts of the Twentieth General Assembly took effect, is not liable for expenses incurred and paid by the county for the support of such insane person after the receipt of said money from the government, and before an order appropriating out of said estate for future support had been made.

2. ———: ———: ———. Neither is such money liable for expenses incurred and paid by the county for the support of such insane person before said statute was enacted. [ROBINSON, J., *dissenting*.]

*Appeal from Fayette District Court.*—HON. L. O. HATCH, Judge.

MONDAY, OCTOBER 26, 1891.

PROCEEDINGS for the allowance of a claim against the estate of a person insane. From an order allowing a portion of the claim the defendant appeals.—*Reversed.*

*H. P. Hancock*, for appellant.

*D. W. Clements*, for appellee.

ROBINSON, J.—In May, 1861, Jane Nicoll was duly adjudged to be insane by the proper authorities of

Fayette county, and was committed to the Iowa hospital for the insane, where she was confined until the twenty-first day of April, 1873. At that time she was removed to the poor-farm of the plaintiff, where she has since remained. She is now, and has been at all times since May, 1861, insane. For many years she had pending an application for a pension on account of her husband, who had been a soldier of the United States during the War of the Rebellion. The application not having been allowed after the lapse of several years, the plaintiff, with the intent to be reimbursed for its expenses in supporting Mrs. Nicoll, employed an attorney to prosecute the claim, and paid ten dollars for that purpose. In November, 1882, on the application of the plaintiff, H. P. Hancock was appointed guardian of the estate of Mrs. Nicoll, and, having qualified as such, entered upon the discharge of his duties. In December, 1888, the claim of Mrs. Nicoll was allowed, and a sum of money, stated in argument to be about twenty-four hundred dollars, was paid to the defendant for her. The money so paid comprises all the property of Mrs. Nicoll which the defendant has received. In March, 1889, the plaintiff filed against the defendant, for allowance, a claim for three thousand and three dollars and fourteen cents, for expenses incurred in adjudging Mrs. Nicoll insane, in paying her expenses at the hospital for the insane, in supporting her at its poor-farm and for money paid in prosecuting her claim for a pension. The defendant filed objections to the claim on several grounds, one of which was that the money in his hands was not liable for the payment of the claim, because it was money received from the United States as a pension. In April, 1890, the board of supervisors of the plaintiff remitted all of its claim in excess of eighteen hundred dollars. In June, 1889, the court, by consent of parties, ordered the defendant to pay to the plaintiff for the support of Mrs.

Nicoll the sum of two dollars per week, and of that order no complaint is made. On the final hearing the court allowed the plaintiff the sum of seventeen hundred and thirty dollars and eighty-three cents, and from that order the defendant appeals.

I. The order did not, in terms, require the payment of the amount specified from pension money, but the pleadings and stipulations in the case show clearly that the defendant had no other funds, and that the controversy was over the appropriation of the pension money for the payment of the claim of the plaintiff. It is evident that the order was designed to be an appropriation of the pension money to the amount specified, and must be treated by us as having that effect. The money in question is in the possession of the guardian of the estate of the pensioner, and, therefore, is constructively in her possession, and not in the course of transmission to her. The estate of an insane person, subject to execution, is liable for the expenses incurred by the county in his support. Code, sec. 1433. The right to be reimbursed for such expenses, if not waived by the board of supervisors, is similar to the right to recover from the estate money for any other legal purpose, and is governed by the same rules. We are required to determine in this case whether the pension money of an insane person, received from the United States after chapter 23, Acts of Twentieth General Assembly, Iowa, exempting pension money, took effect, is liable for expenses incurred and paid by the county in which such person has his legal residence for his support. We are agreed that the pension money is not liable for such expenses incurred after the act named took effect, and before an order appropriating money for future support is made. Whether it can be appropriated by an order providing for expenses to be

1. PROPERTY exempt from execution: pension: support of insane.

thereafter incurred is a question not involved in this case, and not determined.

II. In regard to the right of the county to have appropriated pension money received after the act named 2. —: —: —. took effect, for expenses incurred and paid by it in support of the insane pensioner before that time, we are not agreed. As to that, the rule announced by the majority of this court in *Crow v. Brown*, 81 Iowa, governs. The writer adheres to the views expressed in the minority opinion in that case, bnt the other members of the court are satisfied with the views expressed in the majority opinion, and the order of the district court is, therefore, REVERSED.

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R. TRUMAN, Appellant, v. J. F. BISHOP *et al.*, Appellees.

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1. **Promissory Notes**: INDORSEMENT IN BLANK: PAROL EVIDENCE: VERDICT: EVIDENCE. Where in an action against one upon his indorsement in blank upon a promissory note the defendant relied, as a defense thereto, upon proof of an oral agreement, alleged to have been made at the time of said indorsement, that the plaintiff was to take the note without recourse on the defendant, and the preponderance of the direct evidence to the fact of such agreement was with the plaintiff, but it appeared that the consideration received by the defendant for the transfer of said note was considerably less than the face value thereof, *held*, that a verdict for the defendant would not be set aside as not being supported by the evidence.

2. **New Trial**: MISCONDUCT OF JURY: PREJUDICE. Where a juryman, during the trial of a cause, disputed with the plaintiff, as to the testimony given by him at a former period of the trial, and then, in an offensive manner, called for the reading of the reporter's notes of such testimony, and afterwards said juryman and another engaged in a controversy with the plaintiff's counsel concerning the proper construction of certain documentary evidence, and because of such conduct the court instructed the jury that the points in the testimony

which were the subject of dispute were wholly immaterial, *held*, that while the conduct of the juryman was improper it could not be said in view of the instruction of the court that the plaintiff was prejudiced thereby.

3. **Promissory Note**: LIABILITY OF INDORSER: INSTRUCTIONS TO JURY. The court instructed the jury that the law presumed from the defendant's indorsement, that he guaranteed the payment of the note, and that the burden of proof was upon the defendant to show that when he indorsed said note he did not *intend* to guarantee the payment thereof. *Held*, that in view of other instructions given by the court, and the fact that the jury found especially that there was an agreement that the plaintiff should take the note without recourse, the error in the instruction was without prejudice to the plaintiff.

4. ———: ———: ———. A written contract made, pending the consummation of the transaction in question, recited, that the defendant S. had "indorsed and deposited" with one D. the note sued upon, and the plaintiff asked the court to instruct the jury that if they found that the defendant S. signed said agreement, then they should not consider the testimony of said defendant respecting the agreement under which said note was taken by the plaintiff. *Held*, that the indorsement on the note was a part of the contract, and that being in blank, and the character of the indorsement not being defined by the contract, it was competent to show by parol that it was to be without recourse, and, therefore, the instruction was properly refused.

*Appeal from Creston Superior Court.*—HON. S. R. DAVIS, Judge.

MONDAY, OCTOBER 26, 1891.

ACTION upon a promissory note. There was a trial to a jury, resulting in a verdict and judgment for the defendant Schmitz. The plaintiff appeals.—*Affirmed.*

*Phillips, Day & Crosby*, for appellant.

*Thos. L. Maxwell* and *J. M. Milligan*, for appellee.

ROTHROCK, J.—I. The note in question is for the sum of four thousand dollars. The following is a copy thereof:

"$4,000. SANTA ANNA, CAL., February 20, 1888.

"On or before two years after date, for value received, in gold coin of the government of the United States, I promise to pay to Carl Schmitz or order, at Santa Anna, California, the sum of four thousand dollars ($4,000), with interest from August 1, 1887, at the rate of ten per cent. per annum, until paid. Interest payable annually, and, if not so paid as it becomes due, to be compounded, and bear the same rate of interest as the principal; and, in case default should be made in the payment of any interest when due, both principal and interest to become due and payable immediately after such default, at the option of the holder of this note; both principal and interest payable in like gold coin.

"J. F. BISHOP."

1. PROMISSORY notes: indorsement in blank: parol evidence: verdict: evidence.

The payment of this note, and another note for thirty-five hundred dollars, of even date therewith, and drawing a like rate of interest, was secured by a mortgage on certain real estate situated in the state of California. On the tenth day of April, 1889, the defendant Schmitz assigned the mortgage securing the payment of said notes to the plaintiff, and indorsed the notes in blank by writing his name on the back of the same, and delivered them to the plaintiff. In consideration for the notes and mortgage, the plaintiff conveyed to said Schmitz a farm in Union county, in this state, consisting of three hundred and sixty acres, and paid him one thousand dollars in money. The mortgage upon the land in California was foreclosed by the plaintiff, and the amount of the note for thirty-five hundred dollars was realized from the foreclosure. The note in controversy was, therefore, unpaid. It was duly protested for non-payment. When this action was brought, Bishop, the maker of the note, made no defense, and judgment was rendered against him for

the amount claimed. The defendant Schmitz answered, claiming that, at the time of the trade with the plaintiff, it was distinctly agreed and understood by the plaintiff and said Schmitz that the plaintiff was to take the note without recourse on the defendant Schmitz, and that he was to look solely to the defendant Bishop and to the mortgage security for payment.

That this is a valid defense, cannot now be called in question, and we do not understand counsel for the appellant to claim otherwise. The precise question was determined by this court in the case of *Harrison v. McKim*, 18 Iowa, 485, where it was held that, in an action by the indorsee against the indorser of a promissory note, on an indorsement made in blank, it is competent for the defendant to show by parol evidence that the plaintiff took the note thus indorsed without recourse.

But it is claimed that the evidence did not warrant the jury in finding that the note was indorsed without recourse, and that the verdict is the result of passion and prejudice against the plaintiff and his action. It is true that the defendant was the only witness who testified to the alleged agreement, and he was plainly contradicted by the plaintiff in his testimony. There were also at least two other witnesses who contradicted the testimony of the defendant on material facts. So far as the number of witnesses and their testimony is to be considered, the very decided weight of the evidence is with the plaintiff; and it is also to be conceded that the burden was on the defendant to establish the defense by a preponderance of evidence. But juries are always directed by the courts, and properly, too, that the preponderance of evidence is not necessarily to be determined by the number of witnesses who affirm or deny a given state of facts. There are other considerations to be taken into account, which we need not here discuss.

There is one line of evidence which the court permitted to be submitted to the jury over the objection of the plaintiff. The defendant was permitted to prove the value of the farm taken in exchange for the notes. He testified as a witness that the farm was worth fifteen dollars an acre, which would make the value of the farm not to exceed fifty-four hundred dollars. Another witness testified that it was of the value of five thousand dollars. This, with the cash payment of one thousand dollars, would make consideration paid for the notes amount to from six thousand dollars to sixty-five hundred dollars. The notes at that time, including the interest, amounted to over eight thousand dollars. In our opinion, the evidence under consideration was relevant to the issue. The contract of indorsement was in dispute. There was a conflict in the evidence upon the fact. It appears to us that the value of the land was a fact proper to be taken into consideration in determining whether the defendant's defense was well founded. It was at least to be considered for what it was worth. If the notes and mortgage were put into the trade at fifteen hundred dollars or two thousand dollars less than their face value and interest, it, to say the least, tends to corroborate the claim of the defendant that he did not make himself personally liable by the indorsement. This evidence is, in principle, the same as where there is a direct conflict in the evidence, as to the contract price of the property or of services, it is competent to show the actual value as corroborative of the claim made by one of the parties. See *Johnson v. Harder*, 45 Iowa, 677; *Delaware Co. Bank v. Duncombe*, 48 Iowa, 488, and *Misner v. Darling*, 7 N. W. Rep. (Mich.) 77; *Campau v. Moran*, 31 Mich. 280. We cannot disturb the verdict as being without support in the evidence.

II. It is further claimed by counsel for the appellant that certain jurors were guilty of such gross

2. New trial: misconduct of jury: prejudice.

misconduct during the trial as to require the verdict to be set aside on that ground. The misconduct complained of is set out in the bill of exceptions as follows: "Be it further remembered, that during the taking of the testimony in said cause one of the jurors named Kirsch asked the plaintiff what he testified at a former period in the trial about having been in the office of the Madison House, and stated, in the presence of his fellow-jurors, that he understood the plaintiff Truman to testify that he had never been in the office of the Madison House; and then, in an imperious and commanding tone, he said that he called for the reading of Truman's testimony, as shown by the reporter's notes. Be it further remembered that, during the argument of the plaintiff's counsel to the jury, two of the jurors, Kirsch and Hall, engaged in a discussion and controversy with the plaintiff's counsel in regard to the meaning and construction of Exhibit C; and Kirsch stated that, as he understood the contract, it simply provided for a forfeiture of five hundred dollars in case either party failed to complete the undertaking; and the conduct and manner of both jurors was such that the court at the time remarked that the action of the jury was unusual and extraordinary; and, because of such conduct and manner the court gave to the jury instruction, numbered 8,* after he had completed the instructions intended to be given." We are of opinion that the jurors charged with misconduct did not conduct themselves in that orderly manner which usually prevails in courts of record in this state. It is always allowable, and we

*8. At the request of the plaintiff you are further instructed that it is wholly immaterial whether the defendant Schmitz left said notes with the witness Davenport, and gave the plaintiff a lien upon them pending the completion of the contract of sale of notes. His liability as an indorser would begin at the time he delivered the note to plaintiff. The question for you to determine is whether when Schmitz indorsed said note it was the agreement between himself and Truman that Truman was to look solely to Bishop and the mortgage on the California land for payment, and this you must determine from the evidence.

think courts generally approve, of jurors asking occasional questions of witnesses while giving their testimony. But it is manifestly improper for a juror to enter upon disputes, and call for the reading of minutes of testimony previously given, and to enter upon a discussion and controversy with counsel in the case as to the construction of written evidence. But we cannot say, in view of the instruction given by the court to the jury which is referred to in the above extract from the bill of exceptions, that the plaintiff was at all prejudiced by the unseemly and reprehensible conduct of said jurors.

III. Complaint is made of the first paragraph of the charge to the jury. So far as material to the question, that part of the instruction is as follows: "So, if the person to whom a note is payable transfers it to another person, and writes his name upon the back of the note, the law presumes that he guarantees the payment of the note if the original maker of the note refuses to pay it; and the burden of proof is upon the indorser to show that when he indorsed it he did not intend to guarantee such payment." It is claimed that this instruction is erroneous because the liability of the indorser is thereby made to depend upon his mere intention; that it may be a mere secret intention, not disclosed to the indorsee. This instruction should have been more explicit. But in view of the other instructions given by the court, and in view of the fact that the jury found specially that there was an agreement that the plaintiff should take the note without recourse, the error, if any, was without prejudice to the plaintiff.

3. PROMISSORY note: liability of indorser: instructions to jury.

IV. The plaintiff's counsel requested the court to charge the jury as follows: "If the contract (Exhibit C) introduced in evidence was signed by defendant and Truman, as testified to by

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Truman and Davenport, then that contract, under the law, embraces the entire agreement of the parties, which cannot be added to, varied, modified or explained by the testimony of the defendant Schmitz; and, if you find that such agreement was signed as above stated, you will lay entirely out of the consideration of this question all the testimony of the defendant Schmitz as to the terms of the contract." It appears in evidence that when the terms of the exchange were agreed upon between the plaintiff and the defendant they did not have a description of the mortgaged land, and they entered into a written agreement touching their contract, which was drafted and held by one Davenport until the assignment and conveyance could be executed. This written contract is the one referred to in the instruction as "Exhibit C." It contains the following clause: "And R. Truman has deposited in the hands of D. Davenport five hundred dollars, and, when said Schmitz shall comply with his part of this contract, then, if R. Truman shall fail or refuse to comply with the same, he hereby forfeits to said Schmitz said five hundred dollars as liquidated damages, and said Schmitz has indorsed and deposited with D. Davenport the two notes above described." It is urged that because this written contract recited that the notes were indorsed by Schmitz, and deposited with Davenport, this was a full indorsement, made so by the written contract, and that it is not competent to contradict it by parol evidence. But in construing the contract reference must be had to the notes, and to the indorsement which was actually made thereon. The blank indorsement was a part of the contract, and it is competent to show by parol that it was agreed that it should be without recourse. Such evidence does not in any sense contradict the written contract. The notes were indorsed, and the contract does not define

the character of the indorsement. That is to be ascertained by what was written on the back of the notes.

V. The defendant attempted to appeal from a ruling of the court upon a demurrer to two counts in the answer. We need not determine whether an appeal will lie in behalf of the appellee. As we find that there is no error demanding a reversal of the judgment, the same will be AFFIRMED.

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## R. M. STANBROUGH, Appellant, v. EDWARD COOK, Appellee.

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1. **Lease of Lands Pending Litigation**: CONSTRUCTIVE NOTICE: RIGHTS OF LESSEE. Under a lease of lands taken pending proceedings to foreclose the lessor's equity of redemption in the leased premises, the lessee will hold said premises subject to the rights of the plaintiff in said proceeding, and will be bound by the judgment rendered therein although not made a party thereto.

2. ———: ———: ———: EFFECT OF OPENING JUDGMENT AS TO LESSOR. The lessor having been served with notice of said proceeding by publication only, her subsequent appearance to defend, as provided by section 2877 of the Code, *held*, not to extend the time of said lessee's right of possession under said lease, pending the retrial, beyond the limit of time for redemption by said lessor as fixed by said judgment.

3. **Foreclosure of Mortgage**: REDEMPTION: RIGHT OF POSSESSION. An adjudication entitling persons interested in real estate to redeem from a foreclosure sale thereof after the expiration of the statutory period for redemption will not entitle such persons, nor those claiming under them, to the possession of such property during the extension of time for redemption, and after the delivery of a sheriff's deed under said sale.

4. ———: CONVERSION OF CROPS BY LESSEE: LIABILITY TO GRANTEE UNDER SHERIFF'S DEED. A lessee of lands under a lease as above described is not entitled to the protection of the provisions of section 3264 of the Code as against an action to recover damages for the wrongful conversion of pasturage and crops raised upon the demised premises after the execution and delivery of a sheriff's deed to the plaintiff in said foreclosure proceeding.

5. ———: ———: ———. An action for damages based upon such conversion may be maintained by the owner of the premises under sheriff's deed while the lessee is in possession, and before an action to recover the demised premises has been commenced.

*Appeal from Delaware District Court.*—HON. D. J. LENEHAN, Judge.

MONDAY, OCTOBER 26, 1891.

ACTION to recover the value of certain pasturage and crops alleged to have belonged to the plaintiff, and to have been wrongfully appropriated by the defendant, and converted to his own use. There was a trial by the court, without the intervention of a jury, and a judgment in favor of defendant. The plaintiff appeals. *Reversed.*

*Powers & Lacy* and *Yoran & Arnold*, for appellant.

*Henderson, Hurd, Daniels & Kiesel*, for appellee.

ROBINSON, J.—The pasturage and crops in controversy grew on land which is owned by the plaintiff. He obtained the title as follows: In March, 1882, H. P. Chapman, then the owner of the land, executed a mortgage thereon to one Emma Chase, which was duly recorded on the first day of April of that year. That mortgage was foreclosed by a decree which was rendered on the fifteenth day of February, 1887. On the twelfth day of the next September the land was sold to the plaintiff under the decree of foreclosure, and on the fifteenth day of September, 1888, a sheriff's deed therefor was executed and delivered to the plaintiff, and duly recorded. The defendant took possession of the premises in March, 1888, under a lease made to him by Susan E. Daniels. She claimed title from Chapman through the foreclosure of a mortgage given by him on the first day of March, 1884. That mortgage was

foreclosed, the property in controversy sold under the decree of foreclosure, and on the seventh day of April, 1887, a sheriff's deed therefor was issued to Lucy Daniels. On the twenty-sixth day of October, 1887, she conveyed the interest she acquired by the sheriff's deed to the lessor of the defendant. Some questions in regard to the title under which the parties to this action respectively claim were considered in *Stanbrough v. Daniels*, 77 Iowa, 562. A decree of foreclosure was rendered in favor of the plaintiff in that case, and the time for redemption was extended by this court for the period of ninety days from the twentieth day of May, 1889. Susan E. Daniels had been made a party to that action, but was served with notice thereof by publication only, and did not appear therein until after the rendition of the decree, which was in March, 1888. In January, 1890, she appeared in the district court, and on her application it was ordered that there be a retrial of the cause so far as it affected her, and that she be permitted to make defense. She thereupon filed an answer, in which she set out several defenses, but it does not appear that there has yet been a retrial.

I. The defendant was not made a party to any of the foreclosure proceedings affecting the land, and his rights and those of his lessor have never been adjudicated excepting by the decree in the case in which the retrial was ordered.

1. LEASE of lands pending litigation: constructive notice: rights of lessee.

About the fifteenth day of September, 1888, the plaintiff demanded of the defendant the possession of the premises; and on the eleventh day of October, 1888, the plaintiff served upon the defendant a notice in writing to quit and surrender the premises within three days. On the second day of the next month the plaintiff notified the defendant to quit and surrender the premises within thirty days, and on the twenty-second day of December, 1888, and again on the twenty-fourth day of August, 1889, similar notices

were served. This action was commenced on the thirtieth day of October, 1889. Prior to that date the defendant had paid to Susan E. Daniels all the rent which had become due by the terms of her lease. The petition alleges that the plaintiff is and has been since the fifteenth day of September, 1888, the owner in fee simple of the premises in controversy, and that he has been entitled to the exclusive use and occupation thereof at all times since that date, and that during that time the defendant has wrongfully occupied the premises, and has wrongfully gathered and converted the crops and products therefrom to his own use. Judgment for one thousand dollars and costs, and for an injunction to restrain the defendant from a repetition or continuance of the wrong, is demanded.

The case of *Stanbrough v. Daniels* was commenced in October, 1887. On the first day of the next month an amendment to the petition making Susan E. Daniels a party defendant was filed. The relief asked was the foreclosure of the lien of the plaintiff represented by the sheriff's certificate of sale held by him, and the fixing of a time, as against all the defendants, not extending beyond September 12, 1888, within which redemption from the sheriff's sale should be made; and, if redemption was not made within the time fixed, then that the defendants be forever estopped from claiming any interest in the premises in controversy. The demand for relief was based upon a sufficient statement of facts in the petition as amended, and from the time the amendment was filed all parties interested in the premises had constructive, if not actual, notice of the title thereto of the plaintiff and of Susan E. Daniels. The last-named person was adjudged in default for want of an appearance on the twentieth day of March, 1888, and on the same day the court found against all of the defendants, and in favor of the plaintiff, adjudging his lien as represented by his certificate of sale to

be paramount and superior to that of each and all of the defendants, and decreeing that, unless redemption from the sheriff's sale should be made on or before the twelfth day of September, 1888, all the right, title and claim of the defendants should be absolutely and forever barred and foreclosed. The defendant took his lease a short time before the decree was rendered, but with constructive notice that the plaintiff demanded and claimed to be entitled to the premises. His lease was, therefore, subject to all the rights of the plaintiff, and he acquired no greater right to occupy and use the premises than that possessed by his lessor. The title of the lessor had been acquired through a mortgage which was junior to that under which the plaintiff claimed, and to which it was subject. *Downard v. Groff*, 40 Iowa, 597; *Shricker v. Field*, 9 Iowa, 371; *Shaw v. Heisey*, 48 Iowa, 468; 2 Freeman on Executions, sec. 335. The interest acquired by the defendant, as fixed by the decree, was the right to occupy and use the premises until the twelfth day of September, 1888, and no longer, unless redemption was made. The fact that he was not made a party to the foreclosure proceedings did not enlarge his rights, nor affect those of the plaintiff fixed by the decree, for the reason that the litigation was pending when the lease to defendant was given. He was bound by the judgment, although not made a party to it. Code, sec. 2628; *Jackson v. C., M. & A. Ry. Co.*, 64 Iowa, 294, and authorities therein cited.

II. It is said that the foreclosure proceedings, as against Susan E. Daniels, are still pending, and that the decree rendered against her by default is entitled to no weight as an adjudication of her interests and the rights created by her lease to the defendant. Her application for leave to make defense in the action was authorized by section 2877 of the Code. That provides that when a judgment has been rendered against a defendant, who did

2. ——: ——: ——: effect of opening judgment as to lessor.

not appear, and who was served by publication only, he may appear at any time within two years after the rendition of the judgment, and move to have the action retried, and, security for costs being given, that he shall be admitted to make defense. It further provides that, when that is done, "the action shall be retried as to such defendant as if there had been no judgment." But that clause refers only to the mode of trial. In all other respects the judgment stands as rendered until, upon the new trial, grounds are disclosed for modifying or setting it aside. That is clearly indicated by the following provision: "And upon a new trial the court may confirm the former judgment, or may modify or set it aside, and may order the plaintiff to restore any money of such defendant paid to him under it, and yet remaining in his possession, and pay to the defendant the value of any such property which may have been taken in attachment in the action or under the judgment not restored." Section 2878 provides "that the title of a purchaser in good faith to any property sold under attachment or judgment shall not be affected by the new trial permitted by the preceding section, except the title of property obtained by the plaintiff, and not bought in good faith of him by others." A new trial, as prescribed by section 2877 of the Code, is recognized by chapter 1 of title 19 of the Code in regard to proceedings to reverse, vacate or modify judgments. Sec. 3154, subd. 2. Section 3159, found in that chapter, provides that the judgment shall not be vacated until it is adjudged that there is a valid defense to the action; and that, when the judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment. No relief from the judgment rendered on default, and no restitution of the property acquired under it, are authorized until a retrial is had. It is treated as a full adjudication of the rights of the

parties until, on a new trial had as though it had not been rendered, it is found to be erroneous, and is modified or vacated. See *Morton v. Coffin*, 29 Iowa, 238. Our conclusion is not in conflict with what was determined in *Pollock v. Simpson*, 67 Iowa, 519. The question involved in that case was whether a notice of an application for a retrial, under section 2877, was necessary, and this court held that it was not, saying that, "for the purpose of a retrial, the judgment theretofore rendered is to be treated as a nullity." The effect of the judgment for other purposes was not considered.

III. It is claimed that the time given by this court for redemption in *Stanbrough v. Daniels*, *supra*, did not expire until the eighteenth day of August, 1889, and that the right of redemption carried with it the right of possession. Susan E. Daniels was not a party to the decree named, and whether she can derive any benefit from it may be doubtful; but, conceding for the purposes of this appeal that she can, we have to say that the right of redemption given by the decree was not the statutory one, and gave no right of possession. The plaintiff in the case had obtained a decree foreclosing his lien, as against all the defendants in the action, and fixing the twelfth day of September, 1888, as the time after which redemption could not be made. He received a sheriff's deed a few days after that date, and thereby acquired the right of possession under a title, which was paramount to that under which Lucy Daniels and her grantee claimed. The appeal did not affect the right of possession he thus acquired, and the decree did not refer to it, and did not operate to defeat or modify it.

8. ——: foreclosure of mortgage: redemption: right of possession.

IV. The delivery of the sheriff's deed to plaintiff vested in him the ownership of the premises, and of

4. —: conversion of crops by lessee: liability to grantee under sheriff's deed.

the crops then growing thereon, and the right of immediate possession. *Wheeler v. Kirkendall*, 67 Iowa, 612; *Martin v. Knapp*, 57 Iowa, 343; *Hecht v. Dettman*, 56 Iowa, 680; *Downard v. Groff*, 40 Iowa, 597. But the appellee contends that he is a tenant in possession, in good faith, under a lease from another; that he has paid all the rent which is due by the terms of his lease; and that he is entitled to the protection of section 3264 of the Code. That provides that "a tenant in possession in good faith, under a lease or license from another, is not liable beyond the rent in arrear at the time of suit brought for the recovery of land, and that which may afterwards accrue during the continuance of his possession." That section is found in a chapter which provides for actions for the recovery of real estate, and evidently refers to actions of that kind. This is not such an action, but is brought to recover damages for the wrongful conversion of pasturage and crops. The section does not, therefore, apply. *Gardner v. Gardner*, 25 Iowa, 102. It is said the authority cited supports the claim of the appellee that he is not liable in this action. But in that case there was a dispute as to titles, the tenant holding under the apparent owner of the legal title. That title was set aside as fraudulent by means of an action in equity to which the tenant was not a party, but before it was so adjudged he had paid the rent in full to his landlord. This court held that it was the duty of the tenant to pay the rent to his landlord, and that, under the facts of that case, he could not be held liable to the person who was adjudged to be the owner of the land. The case of *Kieth v. Paulk*, 55 Iowa, 260, is also relied on by the appellee. The facts in that case were also peculiar. There was a dispute as to the ownership of the leased premises, the tenant leasing of the party who had actual possession. His lessor brought an action to set aside the title of the

one who proved to be the real owner, and succeeded in the district court, but on appeal the judgment of that court was reversed. Before the case was decided on appeal the tenant had paid the rent, and his term had expired. In the opinion rendered by this court, stress was placed on the fact that the tenant could not have successfully resisted an action brought by his lessor to recover rent. In this case the defendant was under no obligation to pay rent for the use of the premises had after the sheriff's deed was issued to plaintiff. It was then his right to attorn to the plaintiff, without liability for so doing to his lessor. Code, sec. 2013; *Mills v. Heaton*, 52 Iowa, 216; *Mills v. Hamilton*, 49 Iowa, 108; Code, sec. 3611; *Wheeler v. Kirkendall*, 67 Iowa, 612.

V. It is insisted that this action cannot be maintained, because the appellee is in possession of the premises, and no action to recover them has been brought. We do not think the claim is sound. If the defendant appropriated and converted to his own use crops which belonged to the plaintiff, a right of action therefor accrued to the latter, which he is entitled to enforce without regard to any question as to the continued occupation of the premises on which the crops grew.

5. —: —: —.

VI. In our consideration of this case we have necessarily treated the rights of the parties as fixed by the decree of March 20, 1889, in favor of the plaintiff, and against Susan E. Daniels, as that does not appear to have been vacated or modified. The judgment of the district court will be reversed, but without prejudice to the right of the defendant to show, if he can, that the decree named is no longer of validity as against him. REVERSED.

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# J. K. GRAVES, Appellant, v. KEY CITY GAS COMPANY, Appellee.

1. **Injunction**: BREACH OF CONTRACT: IRREPARABLE INJURY. The defendant, by a resolution of its board of directors, agreed that gas for all ordinary purposes, including gas log in library, thereafter used in the then residence of the plaintiff, and including two street lamps in front of said residence in a street named in the city of Dubuque, should be free of cost for a period not exceeding twenty years. *Held*, that said contract was not void for uncertainty; and that upon the petition of the plaintiff alleging that the defendant threatened to disconnect the gas pipes, so as to wholly cut off the supply of gas to which the plaintiff was entitled under said contract, a temporary injunction should have issued restraining the defendant from said action, notwithstanding the financial responsibility of said defendant for the payment of any damages sustained by the plaintiff.

2. ———: ———: ———: PREVIOUS BREACH BY PLAINTIFF. Conceding that the plaintiff was using an excessive quantity of gas in violation of said contract, and that the defendant might be entitled to relief against the plaintiff on that account, *held*, that such fact would not excuse the threatened action of the defendant, nor constitute sufficient ground for the denial of an injunction.

3. ———: ———: ———: RELIEF DENIED: RENEWAL OF APPLICATION. The court having refused to order a temporary injunction upon the filing of the plaintiff's original petition alleging the threatened action of the defendant as above stated, the plaintiff filed an amendment to his petition alleging that the defendant had cut off the gas from the plaintiff's house by introducing water into the pipes, and renewed his application for an injunction. *Held*, that the amendment presented a different case from that of the original petition, and that the plaintiff's application for an injunction upon such new ground should have been granted.

4. ———: ———: ———. The fact that the defendant had been garnished upon process issued from the United States circuit court in an action there pending against the defendant *held* to constitute no ground for the denial of an injunction as prayed.

*Appeal from Dubuque District Court.*—HON. D. J. LENEHAN and HON. J. L. HUSTED, Judges.

MONDAY, OCTOBER 26, 1891.

ACTION in chancery to restrain the defendant from depriving the plaintiff of gas which he claims under a contract between the parties. The court upon two several applications refused to grant a temporary injunction. From these orders the plaintiff appeals. *Reversed.*

*R. W. Stewart*, for appellant.

*Powers, Lacy & Brown*, for appellee.

BECK, C. J.—I. The petition alleges that the defendant is authorized to supply gas for illuminating and other purposes to the citizens of Dubuque, and that the plaintiff is a citizen of that city, occupying, with his family, a dwelling in Fenelon place, where the defendant has maintained gas pipes for a great many years. It is further shown that, on the third day of June, 1880, the plaintiff and the defendant entered into a contract, as set out by a resolution adopted by the board of directors of the defendant, and duly entered upon the records of the company, which is in these words:

"Be it resolved, that in consideration of the sum of one dollar to us in hand paid by J. K. Graves, and as part consideration of purchase made by us of the gas works and property of the Key City Gaslight Company, we hereby consent to and agree that gas for all ordinary purposes, including gas log in library, hereafter used in the present residence and out-buildings of said Graves, and including two street lamps in front of said residence on Fenelon place, city of Dubuque, shall be free of cost for a period not exceeding twenty years: provided, said premises are occupied by said Graves or his family as their residence."

It is next alleged that the defendant refuses to supply the gas provided by this contract, and threatens to disconnect the gas pipes, so as to wholly cut off the supply of gas to which the plaintiff is entitled under the

contract. Upon this petition the plaintiff asked that a temporary injunction be issued. The defendant objected to the allowance of such injunction upon these grounds:

"*First.* Because it is not claimed that the defendant is not financially responsible for any damages resulting to the plaintiff. *Second.* Because it does not appear that the plaintiff will suffer any irreparable injury from the alleged threatened acts of the defendant. *Third.* Because it does not appear that the defendant has threatened to cut off the gas from the plaintiff's premises so long as plaintiff confines his use thereof within the limits fixed by the contract referred to. *Fourth.* Because it does not appear that the plaintiff has paid, or is willing to pay, the prices which the defendant is entitled to collect from the ordinary consumers in the city of Dubuque, and that his only claim is based on the alleged special agreement with the defendant, and that such agreement is so vague, indefinite and uncertain that it is not susceptible of specific performance, and a decree therefor could not properly be ordered, nor an injunction against its violation be properly issued. And the defendant says that, upon the affidavits annexed hereto and filed in support hereof, it appears that the plaintiff has himself violated the alleged agreement upon which he relies, and has excessively, wilfully and wrongfully used the defendant's gas, and is, therefore, not entitled to the relief sought; and that the defendant has never threatened to violate the agreement, and that the only wrong committed or threatened has been on the plaintiff's part; and that the injunction sought would enable the plaintiff to have unlimited control of his consumption of gas, to the great injury of defendant and its consumers."

The defendant filed affidavits tending to show that the plaintiff had used under the contract an immense quantity of gas, more than five times as much as any

other single private consumer in the city; that he used a gas log in the library, and used or attempted to use gas for heating purposes. The plaintiff denies the use of gas for any other than illuminating purposes and the gas log specified in the contract. The defendant, in resisting the application for the injunction, seems to rely upon the alleged extravagant and unwarranted use of the gas. It showed that it does not object to the use of an amount of gas by the plaintiff exceeding the use of any other private consumer, and proposed to the plaintiff that he should limit his use to such an amount, which he refuses to do. The defendant denies that it has threatened to cut off the gas if it be confined to the limits fixed by the contract. The court (HON. D. J. LENEHAN, Judge) refused to allow the temporary injunction.

II. Subsequently the plaintiff amended the petition, showing that the defendant had cut off the use of the gas by introducing water into the pipes, thus cutting off all the gas from the plaintiff's house and the street lamps adjacent thereto. Upon this amendment the plaintiff again asked for a temporary injunction as prayed for in his petition. The defendant, answering other matters set up upon the second application, shows that it has been garnished by a creditor of the plaintiff in an action pending in the United States circuit court. To this answer the plaintiff filed a verified reply. After the amended petition and the subsequent pleadings were filed the plaintiff again moved the court to grant a temporary injunction, which was refused.

III. The resolution of the directors of the defendant, we think, expresses in unmistakable language a contract whereby it became bound to furnish the plaintiff gas for ordinary purposes, "including gas log in library" and two street lamps, to be used in the plaintiff's dwelling and buildings, for the period of twenty years, if Graves

1. INJUNCTION: breach of contract: irreparable injury.

or his family occupy the building that long. The validity of this contract, we think, cannot be doubted; and its language, when interpreted under the rules of the law, expresses with sufficient clearness and certainty the agreement of the parties. The defendant, by the contract, undertakes, upon considerations before recited, to furnish gas to the plaintiff as provided for in the contract. The gas is furnished from pipes running from the mains, presumably owned by the defendant, into and through the plaintiff's dwelling and premises. The refusal to supply the gas is not only a breach of contract, but is in effect an interference with the plaintiff's enjoyment of his property by its use, as contemplated by the parties when they entered into the contract. The plaintiff, by his contract, provides for gas to be used for illuminating and other ordinary purposes. If the defendant may withhold the supply of gas, the plaintiff may obtain it from no other existing source; for the defendant, it appears, has in effect at the present a monopoly of the right to furnish gas to private consumers such as the plaintiff. His gas pipes and gas burners and fixtures would become useless and valueless, and he would be deprived of gaslight which to a certain extent is regarded by housekeepers using it as a necessity and a source of comfort. As the plaintiff can supply his dwelling, outhouses and street lamps in no other way, this injury cannot be repaired. If the defendant supplies him with no gas, he must do without it and the comfort it brings. It is, therefore, irreparable. It is true, he could use candles, oils or electricity; but he contracted for gaslight, and is entitled to it. It will not do to say he may have compensation in damages. It would be difficult, if not impossible, to estimate his damage. If it might be done, there would be delay in compensation, subjecting the plaintiff to discomfort, inconvenience and loss for probably a protracted period. Equity will not permit

one to be deprived of his rights in this way by the violation of a contract, but by injunction will interfere to prevent it.

IV. It is insisted that, as the plaintiff violated the contract for gas by using a quantity largely in excess of the amount provided for by the contract, the defendant may cut off the supply, and deprive him of the use of all gas. Such deprivation would extend to some gas-burners,—the street lamps, for instance, through which it is not shown excessive quantities of gas were used. The plaintiff insists that his use of the gas has not been excessive or wasteful, and was contemplated when the contract was made. It is true that the evidence tends to show a large use by the plaintiff; but, if such use of gas was made by the plaintiff with the knowledge of the defendant without complaint or objection on account of the alleged excess, the defendant thereby acquiescing in such large use, and putting a construction upon the contract as to the quantity authorized to be used, ought not now to be permitted to disregard its acquiescence, and take the law in its own hands, and enforce its claims by disregarding its contract according to the interpretation it had put on it. Such acquiescence puts the laboring oar in the hands of the defendant. It must establish its interpretation of the contract and its rights thereunder upon a trial of the issues of the case. If it be made to appear upon the law and the facts as developed in the case that the defendant is entitled to relief of some character, the law will not permit it to help itself to that relief, and deprive the plaintiff of all gas contemplated by the contract.

2. —: —: —: previous breach by plaintiff.

V. It is insisted by the defendant's counsel that after the injunction was refused on the first application of plaintiff under Code, section 3392, no other applications were to be considered. The second application presented a differ-

3. —: —: —: relief denied: renewal of application.

ent case, in that it showed that the defendant had cut off all gas from the plaintiff's premises. The first application showed only a threat. In our opinion, the court erred in refusing the first application, and, the petition having been amended, the second application ought to have been allowed.

VI. The defense based upon the garnishment in the United States court surely is no ground for refusing the plaintiff relief. Neither reason nor authority is adduced in its support. It may be further said that there is no evidence before us supporting this defense. We reach the conclusion that a temporary injunction ought to have been allowed in the case.

4. —: —: —.

VII. As we have intimated, there is evidence which it is claimed tends to show that the plaintiff has been using an excessive quantity of gas. If, after the injunction is allowed, there be in fact an excessive use not authorized by the contract, the defendant will be protected by the injunction bond against loss on account of such future use. The cause will be remanded to the court below for the allowance of a temporary injunction and other proceedings in harmony with this opinion. REVERSED.

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## THE STATE OF IOWA v. IOWA CENTRAL RAILWAY COMPANY.

1. **Decree:** CONSTRUCTION: ENFORCEMENT: "SUCCESSOR" OF RAILWAY COMPANY. A decree commanding a railway company named, and its successors, assigns, grantees and lessees, to maintain and operate a specific portion of its line of road is binding upon, and is enforceable by *mandamus* against, a railway company which was not a party to the action in which said decree was rendered, but was organized sub-

sequent thereto, and acquired its interest in said railway property from a purchaser thereof at a receiver's sale upon the foreclosure of a mortgage.

2. ———: ———: ———. The fact that the specific portion of the railway in question had been leased by the defendant to another railway company, and was being operated in connection with the line of the latter, but not in conformity to said decree, *held*, to be no defense to the issuance of said writ.

## *Original Action for Mandamus.*

MONDAY, OCTOBER 26, 1891.

APPLICATION on behalf of the state for an order against the defendant to show cause why it should not be compelled to obey a decree of this court entered against the Central Iowa Railway Company, and why a writ of mandatory injunction should not issue against it. The defendant having answered, the plaintiff moves for an order as prayed on the pleadings and proceedings as set out, and the case is submitted on this motion.

*John Y. Stone*, Attorney General, for the State.

*Anthony C. Daly*, for defendant.

GIVEN, J.—The application on behalf of the state sets out the decree of this court rendered October 27, 1887, in the case of *State v. Cent. Iowa Ry. Co.*, 71 Iowa, 410, and alleges that the defendant company has become the successor, assignee and grantee of the Central Iowa Railway Company, and as such is operating said line of railway contrary to the provisions of said decree, and in violation thereof, and is disregarding and disobeying the mandate thereof. This decree was entered on appeal in an action to enforce an order of the railway commissioners, and the part requiring notice is as follows:

"And it is further ordered, adjudged and decreed that the said Central Iowa Railway Company, its officers, agents and servants, its successors, assigns, grantees and lessees, and each and every thereof, are directed and commanded, until otherwise ordered, to forever maintain and operate that certain piece and part of railroad lying and being between the depot buildings in Northwood, Iowa, and Manly Junction, Iowa, and will run its and their trains, engines, cars, both passenger and freight, according to regular and public schedule time, on and over said part of said railroad, giving to any and all the public desiring to travel over the same, and to ship freight over the same, the accommodations and facilities incident to and usual to such desired service, and will maintain and operate said part of said railroad in connection with its other road extending south from Manly Junction, Iowa, to Albia, Iowa, and without unusual and unnecessary delays; and to enforce this, the third paragraph of this decree, both a preventive and mandatory writ of injunction will issue at any time on the request of the state of Iowa or its attorney."

The prayer of this application is that the defendant be required to show cause why it should not obey the mandate and order contained in said decree, and why a writ of mandatory injunction should not issue against it thereon, and that upon the hearing hereof an order be made requiring the defendant to obey said decree, and that a writ of mandatory injunction be ordered to issue against the defendant to enforce said decree.

The defendant, in its answer and amendments thereto, says that it is not the successor, assignee and grantee of the Central Iowa Railway Company; that it has never been adjudged to be such; that no judgment or decree has ever been rendered against it commanding it to perform any of the acts in said decree required;

and that no demand has been made upon it to perform any order or do any act commanded in said decree. It is also alleged in the answer that, at the time of and long prior to the rendering of said decree, all the property of the Central Iowa Railway Company had been taken possession of and was being held by the United States circuit court for the southern district of Iowa, through a receiver appointed by that court, December 1, 1886, in a case there depending, wherein the Central Trust Company of New York was complainant, and the said Central Iowa Railway Company was defendant; that a decree of foreclosure of a mortgage was rendered in that court, and all the property of the Central Iowa Railway Company sold thereunder, on the seventeenth day of September, 1887, to James Thompson, which sale was duly confirmed, and conveyances ordered and made; that James Thompson assigned all his right, title and interest so purchased to the Iowa Railway Company, which company subsequently conveyed to this defendant. The defendant further alleges that the Central Iowa Railway Company was defunct and deceased at the time of the rendition of said decree against it, because of the taking possession of its property as aforesaid; that the defendant company had no existence, and was not organized until long subsequent to the rendering of said decree, and had no notice of said suit, and was not a party thereto. It is further alleged that the Burlington, Cedar Rapids & Northern Railway Company is now, and for some time past has been, operating the railway in question from Manly Junction to Northwood, for which it pays the defendant a rental of fourteen thousand dollars a year, and that if the defendant is required to comply with said decree it will be damaged in that sum. With its answer the defendant filed a demand for a jury trial herein.

The state filed a motion to strike a paragraph from the answer, stating that to perform the decree would entail great loss on the defendant, and, also, a motion for a more specific statement in the answer, both of which were sustained; to which the defendant excepted. As the rulings upon these motions are not before us for review, they will not be further noticed.

The application and answer having been filed as stated, the attorney general filed a motion on behalf of the state, as follows: "Comes now the plaintiff, and moves the court to enter the order prayed for in the petition herein, upon the ground that the defendant, in its answer, has not shown cause why such order should not be made, and for the further reason that upon the record and pleadings in this proceeding it appears that the plaintiff is entitled to such order."

I. It will be observed that the decree is against the Central Iowa Railway Company, its officers, agents and servants, its successors, assigns, grantees, lessees and each and every thereof, and that it requires of these the performance of certain duties in the future. It is a final adjudication as to all these persons of all matters embraced in it. It requires no argument to show that this court has power to enforce this decree against the Central Iowa Railway Company, and any person proven or admitted to be its officer, agent, servant, successor, assignee, grantee or lessee. The contention of the Iowa Central Railway Company is that it has denied in its answer that it is successor, assignee or grantee of the Central Iowa Railway Company; that it is entitled to a trial of that issue by a jury; and that this court has no jurisdiction to so try it, and, therefore, cannot make the order asked. It is contended on behalf of the state that the answer shows that the Iowa Central Railway Company is such successor, assignee and grantee, and that the order asked

1. DECREE: construction: enforcement: "successor" of railway company.

should, therefore, be granted upon the record and pleadings before us. It is denied in the answer that the Iowa Central Railway Company is such successor, assignee or grantee. It is not, however, an unqualified denial, but based upon the facts we have stated. It is clear that, if these facts do not support the denial, then it is as if there were no denial; or, in other words, if the facts stated in the answer show that this company is such successor, assignee or grantee, then that allegation is not denied. It will be seen by the facts, as we have stated them, that this company now, and for some years past, has owned and operated the line of railroad in respect to which the decree was entered, and is in the enjoyment of all the rights and privileges granted by the laws of the state to such corporations for the maintenance and operation of railroads within the state. It is alleged as reasons why it is not such successor, assignee or grantee, and not amenable to the decree, that it was not in existence when the decree was entered, and not a party to it; that it has never been adjudged to be such successor, assignee or grantee, and that it has never been commanded or demanded to perform any part of the decree by the judgment of a court or otherwise. That it was incorporated after the decree was entered, is no reason why it might not become the successor, assignee or grantee of the Central Iowa Railway Company; and surely no adjudication or demand is necessary to cause that relation. There can be no doubt but that the facts stated do show that this company is the successor of the Central Iowa Railway Company, within the meaning of the decree. This fact being thus established, it requires no adjudication. The relation exists, and with it the duties and obligations imposed by the decree.

II. The decree requires that the part of the road between Manly Junction and Northwood shall be operated in the manner specified, in connection with the other part of that road

2. —: —: —.

extending south to Albia. The answer shows that it is not and has not been so operated for some time, but that part of the road is being used by the Burlington, Cedar Rapids & Northern Railway Company in connection with its line, under a lease from the Iowa Central Railway Company, at a rental of fourteen thousand dollars per year. It is alleged that to require the Iowa Central Railway Company to operate it under the decree will deprive it of this rental, to its damage in that amount. This, even if true, is no justification for disregarding the decree. There is nothing in the decree to prevent a leasing of this part of the road to be used in connection with another line, but such a use is not an operation of it as required by the decree.

From the record before us we reach the conclusion that the Iowa Central Railway Company is successor to the Central Iowa Railway Company, and as such is bound by the decree of this court, heretofore entered against that company and its successors; and that in failing to operate that part of its road between Manly Junction and Northwood, in connection with the part extending south to Albia, in the manner specified in the decree, it is continuously disregarding and violating said decree, and that an order should be granted as asked on behalf of the state.

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83 726
92 632

# J. C. YETZER, Appellant, v. W. H. APPLEGATE *et al.*, Appellants.

1. **Partnership:** ACCOUNTING: EVIDENCE. Where in an action for an accounting between partners it appeared that an agent employed to make purchases of live stock on behalf of the firm, and also for one of the members of the firm individually, commingled the funds of the firm and of the individual partner by depositing the same in one

account in his own name, and the evidence showed that some of the money of the firm was invested by the agent for the use and benefit of the individual partner, and had not been accounted for, but the evidence as to the amount thereof was voluminous and conflicting, yet favored the finding of the referee that the amount so appropriated was about thirteen hundred dollars, *held*, that the fact that the copartner charging the misappropriation had at all times access to the books of the firm, and was capable of discovering the fraud if practiced, was controlling against his claim that the amount of such misappropriation was as great as seventeen thousand dollars.

2. ———: ———: USURY: EVIDENCE. Where the notes of a firm after a series of renewals were paid by one of the partners after notice from his copartner that the same were tainted with usury, and that he desired to make such defense to the collection thereof, *held*, that the plea of usury was not defeated by such payment, and that the usurious interest charged in the several series of notes should, in an accounting between the partners, be credited against the amount paid by the partner taking up said notes where the fact of usury was established.

*Appeal from Cass District Court.*—HON. A. B. THORNELL, Judge.

TUESDAY, OCTOBER 27, 1891.

THIS is an equitable action, and it involves the settlement of a partnership in which the plaintiff and the defendants were members under the partnership name of W. H. Applegate & Co., and afterwards in the name of Yetzer & Applegate. The business of the firm was buying and slaughtering hogs, and packing the product at a packing-house at Atlantic, in Cass county. The partnership was commenced in the year 1878, and continued under the name of W. H. Applegate & Co. until December, 1881, when the name was changed to Yetzer & Applegate, and the business continued until some time in the month of July, 1882, when it ceased, and all of the product belonging to the firm was sold and applied on the partnership indebtedness. This action was commenced on the twentieth day of March, 1883. Issues were made up soon thereafter. The attorney who represented the defendants removed from the

state. The counsel who succeeded him filed an amended and substituted answer and cross-bill on the tenth day of February, 1887. Other pleadings were filed by the respective parties, and the hearing of the cause was commenced before the court. Afterwards all of the issues were referred to a referee. The referee made a report of the facts found by him, and his conclusions of law, and the report was confirmed by the court, and a decree in accordance therewith was entered. Both sides to the controversy appeal.—*Affirmed.*

*L. L. De Lano*, for plaintiff.

*H. G. Curtis*, for defendants.

ROTHROCK, J.—The printed abstracts and arguments in the case consist of some eleven hundred pages. The abstracts are largely made up of portions of books of account. It appears that expert accountants were employed by the parties, and a great deal of time was taken in endeavoring to arrive at a fair accounting between the parties. When the report of the referee was filed, the plaintiff made a motion that it be approved and confirmed. The defendants filed exceptions to the report at great length. The plaintiff thereupon withdrew his motion to confirm the report, and filed his exceptions. All of these exceptions were overruled, and the report confirmed. The whole case is here for trial anew, and under our judicial system it is incumbent on this court to go through all of these accounts, and determine whether the report of the referee is supported by a preponderance of the evidence. We have endeavored to perform that duty as best we could, and will state our conclusions as briefly as may be, without any discussion or elaboration of the evidence. In our examination of the case, we have been greatly aided by the report of the referee. After a careful reading of all of

1. PARTNERSHIP: accounting: evidence.

the evidence, we have taken up his findings of fact from the first to the last, and examined the evidence bearing upon each finding. If the referee correctly found the facts, his conclusions of law necessarily follow. Indeed, there is no real dispute in the law of the case, and we think there is no real ground for dispute in any question of fact as found by the referee, with two exceptions. It appears that the business of packing pork at Atlantic was first commenced by the defendants, W. H. Applegate and S. J. Applegate. They had a small establishment located on land owned by one or the other of them. At the time the partnership was formed the land and buildings were of the value of about twenty-one hundred dollars. This is the whole amount which up to that time the defendants had put in the business. The plaintiff was at that time, as we understand the evidence, a merchant at Atlantic. He was president of the Cass County Bank, and the largest stockholder therein. He had property and credit, and was thought to be a desirable partner in the business. No member of the firm, as first organized, or ever afterwards, put any of his own money in the business. At the very commencement of the business it was intended that the plant should be improved and built up, and the business carried on upon borrowed money, and this purpose was carried out to the end. It was arranged that the money should be furnished by the Cass County Bank, or from parties in the city of Chicago through that bank. After a time a misunderstanding arose, and ill feeling was engendered between the defendant, W. H. Applegate, and the plaintiff. The plaintiff objected to an indiscriminate drawing of checks upon the bank, and insisted that all checks should be passed through his hands for his approval. This was done, and after that arrangement was made the name of the partnership was changed. This was in December, 1881. When the firm finally

closed its operations it was found that by the books it was indebted to the bank in the sum of about twenty-one thousand dollars. This was evidenced by promissory notes executed by the individual members of the partnership, and the notes drew ten-per-cent. interest after maturity. These notes became due, and the plaintiff took them up, paid part of the amount, and after the commencement of this suit paid off the balance. His alleged object in bringing this action was to relieve himself from the payment of all this indebtedness. This indebtedness to the Cass County Bank was the only amount owed by the firm. It had its buildings and other property. A receiver was appointed when this action was commenced. The pork-house was afterwards destroyed by fire. Certain insurance thereon was paid, and other property was sold; but the whole proceeds are but a trifling amount, as compared to the debt.

The defendant, W. H. Applegate, makes the following claim, as stated by his counsel in this language: "Some time in December, 1881, owing to difficulties between Mr. Yetzer and Mr. Applegate, the work of the firm was discontinued, and an agreement was entered into by which the business was to be carried on by J. C. Yetzer and S. J. Applegate, under the name of Yetzer & Applegate, on account of which business W. H. Applegate was to receive, for his interest in the packing-house business, one-fourth of the profits of the business. The matter of dispute in this case is as to what were the profits of Yetzer & Applegate. The plaintiff claims that there were no profits made, while the defendants and appellants claim that Yetzer & Applegate made a net profit of sixty-five thousand, one hundred and ten dollars and sixty-seven cents, and claim interest thereon from Mr. Yetzer at six per cent. from the time the money was withdrawn from the business to the present time, or up to the time of trial of

this case, making an amount due W. H. Applegate of twenty-two thousand, three hundred and thirty-four dollars and sixty-six cents; from which deduct the note which W. H. Applegate gave the new firm, leaving a balance of twenty-one thousand, five hundred and thirty-four dollars and sixty-six cents, now due him, with interest from the date of trial to this time." The ground of this claim is that Yetzer appropriated to his own use a large amount of the money of the partnership. The specification is that he purchased a large number of hogs at certain railroad stations, with partnership funds, and shipped them to Chicago, and sold them, and gave the firm no credit for the amount of the sales. It is true that one Helmer was employed by Yetzer to purchase hogs for the firm, and that Helmer also purchased hogs for Yetzer. As to this charge of fraud the referee found as follows: "It further appears that, in compliance with the contract of copartnership, as stated in the fourth finding herein, J. C. Yetzer employed one C. J. Helmer, at his own expense, to purchase stock for said firm at Harlan and Avoca; said firm furnishing him the money with which to make said purchases for them. At the same time and places said Helmer was employed in purchasing stock and supplies for the personal use of said J. C. Yetzer, for which purpose he was furnished money by said J. C. Yetzer. That money furnished by said firm and J. C. Yetzer was commingled by said C. J. Helmer, by deposit in one account in his own name. That said funds were so commingled by said Helmer without the knowledge of any party to this action. That, of the funds so furnished by W. H. Applegate & Co., some portion was used by said Helmer in the purchase of stock and supplies for the personal use of J. C. Yetzer, and of which he received the benefit. That said J. C. Yetzer has accounted for the funds so used, except that, during the year 1881, thirteen hundred and sixty-

two dollars of the money of W. H. Applegate & Co. was so devoted to his use and benefit, and for which it does not appear that he has in any way accounted. Of the funds so furnished said Helmer by W. H. Applegate & Co. during the year 1881, the sum of seven hundred and eighteen dollars is no way accounted for by stocks purchased and delivered said firm, nor can I determine from the evidence what disposition was made of it. And it is not shown that any loss or misappropriation of funds of said firm occurred, other than heretofore stated, through the neglect or fraud of any member of said firm."

This finding is one of those to which we have given particular attention, because it is the one on which it is claimed with great zeal in behalf of the defendants that the facts therein found are directly contrary to the evidence, and we are assured by counsel that the evidence shows that Yetzer, by the means above named, deliberately defrauded the other members of the firm of the sum of seventeen thousand dollars or thereabouts. Our examination of the evidence leads us to the same conclusion as that arrived at by the referee. We are free to say that the conclusion cannot be vouched for as entirely accurate; and it is to be understood that in a case like this, where experts differ, mathematical accuracy cannot always be attained. One fact stands out all through the case, and that is that W. H. Applegate, in whose behalf these charges of fraud appear to be made, had at all times access to the books of the firm; and if this enormous fraud had been practiced it would have been promptly discovered by him, and arrested. He does not claim that he was incapable of making the discovery. He is the principal witness by which the defendants claim to have established the fraud.

The other findings of fact, of which we have thought it proper to make special mention, are as

follows: "During the time said firm was conducting their said business large sums were borrowed by note of Cass County Bank, upon which usurious rates of interest were charged and paid; and I further find that the money paid to said Cass County Bank by said firm prior to its dissolution was voluntarily paid, and with the knowledge and acquiescence of all parties to this action. *Ninth.* It does not appear from the evidence what amount of usurious interest was paid by said firm to Cass County Bank prior to the dissolution of said firm. *Tenth.* At time of dissolution of said firm there was no indebtedness against said firm except in favor of members of said firm, and except, further, that Cass County Bank held, of notes executed by the members of said firm jointly, of date of November 30, 1881, one of ten thousand dollars, one of five thousand dollars, and one of six thousand dollars, all due in ninety days, with ten-per-cent. interest after maturity; also note for nine hundred and twenty dollars, due in sixty days, with ten-per-cent. interest after maturity. Said note for nine hundred and twenty dollars represented interest at ten per cent. on the aforesaid three notes to maturity, and accrued interest at ten per cent. on past-due notes for twenty-one thousand dollars, of which said three notes were renewals. In addition to said note of nine hundred and twenty dollars, there had been paid, as interest on notes, of which notes of date November 30, 1881, were renewals, to the sum of seventeen hundred, eighty-nine dollars and sixty-three cents. *Eleventh.* On May 22, 1882, the notes described in the tenth clause hereof, of date November 30, 1881, with the accrued interest thereon from maturity, to-wit, three hundred and twenty-four dollars and seventy-three cents,—total, twenty-two thousand, two hundred and forty-four dollars and seventy-three cents,—were credited with twenty-one hundred and eighty dollars and ninety-six cents, balance in bank to credit of firm,

and with sixty-three dollars and fifty-nine cents interest allowed on such balance; and renewal notes were made by J. C. Yetzer, W. H. Applegate and S. J. Applegate for balance, to-wit, twenty thousand dollars and eighteen cents, and interest thereon for ninety-three days at ten-per-cent. interest, to-wit, for two hundred and five dollars and thirty cents, due in three months, with ten-per-cent. interest after maturity. *Twelfth.* That said notes referred to in the tenth and eleventh findings represented *bona fide* indebtedness from said firm to the Cass County Bank, except so far as they were tainted with usury, as hereinafter described. *Thirteenth.* On April 13, 1883, plaintiff, J. C. Yetzer, took up the notes made May 22, 1882, and paid thereon the sum of twenty-one thousand, five hundred and seventy-nine dollars, and that such was for the purpose of avoiding plea of usury. *Fourteenth.* That prior to April 13, 1883, the defendant, W. H. Applegate, informed said J. C. Yetzer that there was usury in said notes; that he desired to contest said notes on account of usury, and he protested to said J. C. Yetzer against the payment of said notes by said Yetzer on the firm's account. *Fifteenth.* That at the time the money was borrowed from said bank, and notes given, of which the notes described in the tenth and eleventh clauses hereof were in the series of renewals, a greater rate of interest was agreed to be paid than ten per cent. per annum. *Sixteenth.* That the entire amount of interest paid on said original notes and their renewals, down to April 13, 1883, was the sum of forty-six hundred and thirteen dollars and thirty-six cents, and of said amount four hundred and seventy-four dollars was in excess of ten per cent. per annum."

It will thus be seen that the referee in his findings upon the question of usury did not go back of the notes of which those held by the bank were renewals. He deducted all of the interest on these series of notes, which interest

2. ——: ——: usury: evidence.

amounted to forty-six hundred and thirteen dollars and thirty-six cents, and refused to allow the plaintiff for that much of the debt of the firm which he had paid. It is claimed in behalf of the defendants that the finding that the evidence does not show what amount of usurious interest was paid by the firm to the Cass county bank prior to the time these notes were made is not correct. We are content with this finding. It is not satisfactory to either side of the controversy, and they probably never will be satisfied that it is correct. The defendants claim that the evidence amounts to an absolute demonstration that a sum equal to the whole of the principal of the notes was paid upon contracts into which usurious interest entered, and it is asked that the whole amount of the debt be wiped out as usurious. There can be no real dispute that, if the renewals of the indebtedness to the bank were one continuous transaction, all connected together, and at these renewals usurious interest was charged or contracted for, there could be no recovery of any interest from the beginning; and there can be no doubt that the evidence shows that the defendants directed the plaintiff not to pay the notes because they were usurious. Under such circumstances, it is very plain that the plaintiff could not defeat the plea of usury by taking up the notes. But while the law denominates a usurious contract as corrupt and tainted, yet the fact that a contract is usurious should not be left to conjecture. Without further elaboration, we are content to say that it does not appear what amount of usurious interest was paid prior to the two series of notes above mentioned.

As we have said, there is no other objection to the report of the referee by any of the parties which we think it necessary to consider. If the contention of the defendant, W. H. Applegate, should prevail in this case, we should reach the astounding conclusion that a

packing-house plant of the mere nominal value of two thousand dollars could be built up in a short time by an expenditure of some twenty-seven thousand dollars in buildings and improvements, and run for two or three years, doing but a small business, and borrow every dollar of money to make the improvements, and carry on the business at ten per cent. per annum interest, and wind up its career with a profit of sixty-five thousand dollars. It would require most convincing evidence to reach any such conclusion, because it is contrary to all human experience. The decree of the district court will be AFFIRMED.

# APPENDIX.

## NOTES OF CASES NOT OTHERWISE REPORTED.

**WILLIAM HINES, Appellee, v. SUSAN LIGHT *et al.*, Appellants.**

**Cancellation of Deed: AGREEMENT TO CONVEY: PERFORMANCE: EVIDENCE.**

***Appeal from Page District Court.*—HON. GEORGE CARSON, Judge.**

**TUESDAY, MAY 26, 1891.**

**THIS is an action in equity by which the plaintiff demands a decree canceling a deed for a farm made by the defendant, Susan Light, to the defendant, E. H. Light, and compelling the said Susan Light to convey an undivided one-half of said farm to the plaintiff. The ground of the plaintiff's claim is that the said farm was bought by the plaintiff and Susan Light, jointly, from one Beal, and that by agreement the conveyance was made to said Susan Light, because the farm was mortgaged, and that by conveying to one of the joint purchasers it would be more convenient to procure a renewal of the mortgage which the said purchasers agreed to pay. There was a decree for the plaintiff, and the defendants appeal.—*Affirmed.***

***Clark & Hill*, for appellants.**

***W. W. Morsman* and *Raymond Lorane*, for appellee.**

**ROTHROCK, J.—The following facts appear to us to be established by the admissions of the parties, or by a fair preponderance of the evidence: In the month of December, 1888, the plaintiff and the defendant, Susan Light, made a joint purchase of a farm of about one hundred and sixty acres. The land was incumbered with a mortgage of eighteen hundred dollars, which the purchasers agreed to pay. The whole consideration agreed to be paid for the land was about forty-eight hundred dollars. Of this amount two thousand and ninety dollars was paid by the plaintiff, and about nine hundred dollars was paid by Susan Light. These sums, with the amount of the mortgage, made up the whole of the purchase money. When the time came to make the conveyance it was agreed that the title should be taken in the name of Susan Light, and, after a renewal of the**

mortgage, she should convey to the plaintiff one-half of the land. The loan was renewed, but no conveyance was made to the plaintiff, and the said Susan Light conveyed the land to her son, E. H. Light. We have said that these facts are established by a preponderance of the evidence. It is true that it is denied by the defendants that any agreement was made to convey any interest in the land to the plaintiff. They contend that the plaintiff paid the two thousand and ninety dollars of the purchase money as a gratuity or favor to Susan Light, or as an antenuptial provision for her as they were then under contract of marriage. But we do not think this claim finds sufficient support in the evidence to justify it to be found as a fact.

The main defense to the action, and that upon which the decree is founded, is the claim made by the defendant that she repaid to the plaintiff the said sum of two thousand and ninety dollars in full satisfaction for all demands. This the plaintiff denies. A large amount of evidence was taken upon this question. The greater part was taken in open court, and the witnesses were under the immediate observation of the learned judge who presided at the hearing. It appears that the defendant, Susan Light, is a divorced woman. The divorce was procured upon the complaint of her husband. After the separation the husband went to the state of Texas. He is a lawyer, and is practicing his profession in some village in Texas, with a population of one hundred and fifty to two hundred inhabitants. The defendant, E. H. Light, is a son of the said marriage. He is a young man of about twenty-one years of age, and all the evidence is to the effect that he is a gambler and a dissolute character generally. It is not claimed by the defendant that Mrs. Light had the money in her own right with which the alleged payment of two thousand and ninety dollars was made to the plaintiff. It is claimed, however, that the said E. H. Light went to Texas, and that while there his father gave him twenty-five hundred dollars in paper money, and that he carried the money on his person or in his satchel from Texas to Page county in this state, and paid it to his mother, and that on a certain day, about noon, Mrs. Light paid out of said money the sum of two thousand and ninety dollars to the plaintiff. It appears that after the purchase the parties took possession of the farm, and the plaintiff managed it and carried on the farming operations, and all lived in one house. It appears from the evidence of the elder Light, and from that of the son and another party in Texas, that the money was paid to E. H. Light, by his father. And the defendant, Susan Light, and E. H. Light and his wife all testify that the money due the plaintiff was paid to him. The plaintiff in his testimony denied that any payment was made to him by Mrs. Light, and he is to some extent corroborated by one Ellison, who claims that he was with the plaintiff at the house at the time it is claimed that the money was paid. This is about the substance of the oral evidence upon the question of payment. There may be one or two other circumstances which tend to weaken the evidence on the part of the defendants. There is the particularity as to the time, place and circumstance attending the alleged payment; the positiveness with which one or two of the

witnesses testified to the denomination of the paper money, and the fact that no receipt was taken, which rather tend to weaken the confidence in the testimony in behalf of the defendants. But we think if this were all the evidence we would hold that the fact of payment was established by a preponderance of the evidence. But this is not all the evidence. It appears that the father of the defendant, E. H. Light, has a daughter, who resides at Topeka, Kansas. This daughter wrote a letter to her father, in which she expressed her desire to have the son go home, and reform, and quit playing cards. The father answered this letter, and, as it is an important and, as we think, a controlling item of evidence, we set it out in full. It is as follows:

"PONTOTOC, TEXAS, July 15, 1889.

"*Em and Jack.*

"MY DEAR CHILDREN:—Your letter came a few minutes ago. Van left about one week ago, and you have doubtless seen him ere this, I told him to see you before he left Topeka. I talked a great deal to Van, tried hard to get him to remain, but he said he must go back. I gave him thirty dollars; he said he would arrange to come back to Texas and go into my office and quit gambling and never touch another card. Now, Emma, I find Van is a wild and reckless boy, given to gambling as you say; I've got to keep close watch over him, your suggestion about sending for Mary was good, I talked the thing to Van, he was of the opinion that he must go back and she could not come without him, he seems to think lots of her but I'm afraid the marriage stands as you say. I shall send whatever money I do send to you, and you can get their effects and send them to Austin and I can go to Burnett and meet them. I will get a letter from Van soon. I thank you for the history you have given me, it will enable me to act advisably with him. Emma, I shall do all in my power to have Evander do right and make a man of himself. How easy it would be for him if he would write me what he expected to do about coming. I told him I would arrange it for him, and he should live on my place of one hundred and sixty acres just south of the old place or build him a little place in town. I want him to do and live a different life. I made him promise me in any event he would not drink, said he would always think of that when tempted to drink."

This letter was written on the very day that it is claimed that the money was paid by Mrs. Light to the plaintiff. It shows with almost absolute certainty that Light, the younger, left Texas with thirty dollars paid him by his father, and not with twenty-five hundred dollars. The attention of the elder Light was called to this letter, and the explanation he makes is not at all satisfactory to any trier of the facts. Indeed, the letter in our opinion completely explodes the claim that any money was paid to the plaintiff.

We have presented such of the evidence in detail as we think warrants us in finding that the decree of the district court is right. We do not usually set out the evidence in equity causes. In the present case we have done so because of the peculiarities attending the controversy between the parties. The plaintiff is not a man of exemplary character

in some respects, but no attack was made upon his character for truth, and we are of the opinion that the court rightly decided that the equities of the case demanded the relief which he prayed. And this disposition of the case renders it unnecessary to determine a motion filed by appellee. AFFIRMED.

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FIRST NATIONAL BANK OF GRUNDY CENTER, Appellee, v. RICHARD MOORE, Appellant.

**Referee's Findings:** CONSTRUCTION: USURY: FORFEITURE: RECOVERY BY COUNTERCLAIM.

*Appeal from Grundy District Court.*—HON. C. P. COUCH, Judge.

MONDAY, JUNE 1, 1891.

ACTION on two promissory notes. There was a judgment for the plaintiff, from which the defendant appeals.—*Affirmed.*

*M. D. Swift* and *Cummins & Wright*, for appellant.

*Rea & Hays* and *Boies, Husted & Boies*, for appellee.

GRANGER, J.—The execution of the notes is admitted by the answer. The defendant and one McWharton were partners in buying and selling hogs, and in the conduct of such business a large amount of money was obtained from the plaintiff bank. By the partnership agreement the defendant was to furnish the money, and McWharton was to perform the labor of buying and selling. The notes in suit, aggregating twenty-five hundred dollars, were given before the settlement of the bank account, and to change the debit from a book account to bills receivable; and it is claimed by the appellant that his deposits exceed the amount he drew from the bank in the sum of fifty-nine hundred and thirteen dollars and seventy-two cents, and, as we understand, that McWharton, without authority from the defendant, used his name to checks which were paid by the bank, and that it was by this means that his debit exceeded his credit account with the plaintiff, and that in reality at the time the notes were made the plaintiff was owing him fifty-nine hundred and thirteen dollars and seventy-two cents. The case was, by consent of the parties, given to Hon. J. H. Bradley as a referee, who found the facts on this branch of the case in favor of the plaintiff. It is insisted to us that under the evidence as a matter of law the finding should be for the defendant. We think not. There are many facts and circumstances besides the testimony quoted by the appellant to be considered in finding the fact, and sufficient to present such a conflict that the finding of the referee, having the force of the verdict of the jury, is conclusive of the question on appeal.

The appellant urges that the referee in his finding of fact has found that the defendant is estopped to dispute the authority of McWharton to draw the money, when there is no estoppel pleaded; and that, because of such finding, there is error. The report of the referee is made up of his findings of fact and law, and also contains comments and reasons for his conclusions. The part of the report showing the finding complained of is as follows:

"The defendant knew of the drawing of the Thomas checks. Had he given the matter any attention he might have known of many others like them. He lived within five miles of the bank, where forty thousand dollars was paid out for him to some one; also lived nearer to the express office, where money was often sent for him; and he must have supposed some one was drawing against shipments. He knew McWharton was making shipments, and expected to profit by his agency. I am of the opinion that either by negligent silence or by consent he was allowing McWharton to do that which he is not now in a position to object to; and, while there is no plea of estoppel, I think the evidence justifies the finding which I now make. Finding: That McWharton had authority to draw the money so as to bind the defendant for its payment."

The appellant quotes the part where the referee says: "I am of the opinion that either by negligent silence or by consent," etc., and concludes therefrom that estoppel was found. If the finding was based alone on the fact of "negligent silence," its effect would be to estop, though not in terms expressed; but the expression of opinion is "either by negligent silence or by consent." If the finding is based on consent, the effect would not be estoppel. Independent of the language of the finding, it is as fair to assume the latter as the former. It appears that the referee had in mind that there was no plea of estoppel, and we think it fair to assume that he used the language to indicate a bar to such a finding, although there is some obscurity when all the language is considered. The "finding" is "that McWharton had authority to draw the money," which is not the usual nor technical method of expressing an estoppel where it is found as a fact. The error suggested certainly does not affirmatively appear.

II. The defendant pleaded that the notes contained usury to the amount of two hundred and twenty-one dollars and three cents under the law of Iowa, and that the plaintiff, being a national bank, could only "charge, demand or receive such rate as was so permitted by the laws of the state of Iowa, viz., ten per cent. per annum." The defendant further claims that by the laws of the United States the penalty is in double that amount, and asks judgment by way of counterclaim for four hundred and forty-two dollars and six cents. The referee's findings upon the question of usury are as follows:

"The plaintiff is and was during the time covered by the transactions a corporation,—a national bank,—organized and doing business in Grundy Center, Iowa, under the 'national bank act' of congress of June 3, 1864. I find that when the notes in suit were made the defendant owed the plaintiff a much larger amount at each time than their face values. They were

made to change the debit of a deposit account to bills receivable, and were discounted, 'A' at ten per cent., 'B' at eight per cent., and the proceeds so ascertained placed to the credit in the account. There was no settlement or adjustment of the account, and the defendant did not know its statement, except that he knew he owed more than the notes. When the last fifteen-hundred-dollar note was made a shipment of stock had been made to defendant's credit, but it was not known how much it would amount to when received. As the account then stood, *i. e.*, before the credit from the shipment was realized by the bank, with item of interest computed as before stated, the debit balance was four hundred and fifty-nine dollars and sixty-three cents, The shipment when received amounted to seven hundred and forty-one dollars and twenty-seven cents. It was the understanding of the parties then (when the note for fifteen hundred dollars was given) that the account should be adjusted and balanced with the proceeds of the shipment. If more than the excess of the account, it should be a credit upon the notes; but, whether more or less, that the account should be truly and justly stated. No agreement would be implied to pay more than ten-per-cent. interest, and none was expressed. The defendant did not know that interest had been computed at a higher rate and charged in the account. The credit of the shipment changed the account to credit balance, and the plaintiff, without defendant's knowledge or consent, credited the first note with two hundred and eighty-one dollars and sixty cents on that day. He was entitled to a credit of three hundred and ninety-four dollars and ninety-three cents instead, and with that credit he has paid no more than ten per cent., nor agreed to do so. His cause for complaint is not that more than lawful interest was contracted or paid, but that he did not receive the proper credit for the shipment. The statute (U. S. Revised Statutes, sec. 5197) prevents the taking, receiving, reserving and charging a rate * * * (ten per cent.) on any loan or discount made, upon any note or other evidence of debt. Sec. 5198. That the taking a greater rate knowingly shall forfeit the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case the greater rate of interest has been paid it may be recovered back in an action, etc. I find that the notes do not carry with them a greater rate than ten per cent.; hence, there is no forfeiture of interest. Also I find that defendant has not paid a greater rate, and, hence, cannot recover the penalty demanded."

The following are his findings under the heading, "Interests on overdrafts," etc.:

"The parties agreed to the rate of ten-per-cent. interest, but not in writing, except where notes were made. In the account kept in the bank the defendant was charged upon the books interest by the way of discount upon the memorandum notes and upon overdrafts at the rate of one per cent. per month. The amount, so charged, up to the giving the notes in suit, and not including interest in or upon them, was in all two hundred and twenty-one dollars and three cents. The defendant did not know of this charge of extra interest, and no agreement was made to pay more than ten per cent. per annum. This amount includes discount on a note

of two thousand dollars, which was paid, and now lost or destroyed, being forty-five dollars; leaving as charged upon and included in the account the sum of one hundred and seventy-six dollars and three cents. I find the amount of interest included in this account for overdrafts, and compute it at six per cent., and it is sixty-two dollars and seventy cents, which, deducted from the (two hundred and twenty-one dollars and three cents minus forty-five dollars) one hundred and seventy-six dollars and three cents, leaves the account too large by the sum of one hundred and thirteen dollars and thirty-three cents."

From the findings it clearly appears that there was no usurious contract, so as to induce a forfeiture under the laws of Iowa, and none is claimed. The notes were for one hundred and thirteen dollars and thirty-three cents too much, and that amount was by the referee credited to the defendant in determining the judgment, which is in conformity to the law of Iowa. There is complaint that the referee neglected to give the defendant credit under the plea of usury for the item of forty-five dollars arising from a discount on a two-thousand-dollar note, which had been paid and lost or destroyed. The referee, in fixing the excess, included in the notes of one hundred and thirteen dollars and thirty-three cents deducted from two hundred and twenty-one dollars and three cents this item of forty-five dollars, because it had been included therein as interest charged to the notes in suit, when in fact it was, as it appears to us, another and independent transaction; and we do not think the referee erred in so doing.

We next consider the question of a forfeiture under the laws of the United States. Conceding, with proper facts, the authority of the state courts to impose the forfeiture, and we look to the record to know the facts. The referee finds that there had been charged on the books interest by way of discount upon "memorandum notes and overdrafts" at the rate of one per cent. per month, and the excess over six per cent. per annum was one hundred and thirteen dollars and thirty-three cents. If we concede that because of this charge of excessive interest in certain particulars the notes were so affected as to induce a forfeiture under the laws of the United States, still we think the plaintiff is without his remedy in this suit. The defendant seeks by his pleading to recover the forfeiture to himself by way of counterclaim. Under the law of the state he could have no such relief. If he appeals to the federal laws therefor they must be applied as construed by the federal courts. In *Barnet v. National Bank*, 98 U. S. 555, where a like claim is made in like manner, it is held that such recovery must be in a separate suit; that it is for a penalty; and he "can have redress in no other mode or form of procedure." The effect of the holding is that the statute fixing the right of recovery fixes the character of the proceeding in which the recovery may be had. The case further holds that the state statutes in such cases as to usury "may be laid out of view. They cannot affect the case." As affecting the remedy it is further said: "Where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply; such provisions are exclusive." See, also, *Farmers & M. Nat. Bank v. Dearing*, 91 U. S.

29. The question is not here presented, and we must not be understood as expressing any opinion as to a right of recovery in the state courts for such forfeitures.

The judgment is AFFIRMED.

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MRS. C. A. DAVIS, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

**Railroads**: LOSS OF BAGGAGE: LIMITATION ON LIABILITY: AMENDMENTS TO PLEADINGS: EVIDENCE.

*Appeal from Marion District Court.*—HON. A. W. WILKINSON, Judge.

MONDAY, JUNE 1, 1891.

ACTION to recover the value of certain clothing and other property taken from a trunk which the plaintiff checked from Massillon, Ohio, to Knoxville, in this state, having purchased a railroad ticket for transportation between these points by a route including the defendant's railroad. A judgment was rendered upon a verdict for the plaintiff. The defendant appeals.—*Affirmed.*

*T. S. Wright* and *Stone & Gamble*, for appellant.

No appearance for appellee.

BECK, C. J.—I. The plaintiff's original petition is in two counts; the first alleging the purchase of a through ticket from Massillon, Ohio, over the Wheeling & Lake Erie, the Baltimore & Ohio and the Chicago, Rock Island & Pacific railroads, and that the defendant issued to her a check for her trunk, containing the property taken from it, which secured its transportation over the route contemplated by the ticket. This count alleges the delivery of the trunk to the defendant in good condition, and the receipt from the defendant of the check. The second count differs from the first in alleging that the plaintiff paid the defendant for her ticket and delivered to the defendant her trunk, which it accepted, and delivered to her the check. The defendant denies the allegations of the petition, and, as a further defense alleges, that under the conditions of the ticket upon which the plaintiff traveled the liability of the defendant was limited to one hundred dollars for loss of wearing apparel from her trunk. The court instructed the jury in effect that the defendant is liable in this action only in case the property was lost while it was in the possession of the defendant, and that no liability attached to the defendant for loss of property prior to its receipt by the defendant. There was evidence tending to show that when the trunk was received by the defendant at Chicago it was in good condition, and the loss occurred while it was in defendant's possession. The jury found for the plaintiff thereon, and the defendant

moved in arrest of judgment, on the grounds, among others, that the petition does not allege that the trunk, when it came into the possession of the defendant, contained the property alleged to have been lost, nor that the property was lost through the negligence of the defendant, its servants or agents, while the trunk was in transportation on the defendant's road. Therefore, the plaintiff, with leave of the court, amended her petition, supplying allegations, the absence of which are the grounds of the motion in arrest just stated. The court overruled a motion to strike this amendment on the ground, among others, that it was not filed in time, but after the verdict. This motion was overruled.

II. The instructions of the court to the jury to the effect that the defendant is not liable for loss happening before the trunk came into its hands are not in harmony with rulings of this court. See *Beard v. St. Louis, A & T. Ry. Co.*, 79 Iowa, 528; *Peterson v. Chicago, R. I. & P. Ry. Co.*, 80 Iowa, 92. But the instruction given the jury is the law of the case, which the jury was required to obey, and the court to consistently follow. Under the rules of these instructions the verdict cannot be sustained, for it was not supported by allegations of the petition showing liability under the rules of the instructions.

Upon the issues as to the condition of the trunk when it was received by the defendant at Chicago, and consequently as to the fault and negligence of the defendant and its employes, though not raised by the pleadings, there was evidence introduced by both parties. Indeed, it was contested as though it had been raised in the pleadings. It is a case where the evidence does not conform to the pleadings,—where there is a variance between the pleadings and the proof. Sections 2686, 2689 of the Code provide that in such case the pleadings at any time may be amended in furtherance of justice, in conformity with the proof. Such amendments may be after the verdict and judgment. *Thompson v. Wilson*, 26 Iowa, 120; *Smith v. Howard*, 28 Iowa, 51; *Tegler v. Shipman*, 33 Iowa, 195. Amendments may be made after judgment. *O'Connell v. Cotter*, 44 Iowa, 48. Amendments are allowed with liberality. "The rule is to allow them; to refuse them, the exception." *Pride v. Wormwood*, 27 Iowa, 257; *Hinkle v. Davenport*, 38 Iowa, 355; *Miller v. Perry*, 38 Iowa, 301. Many other decisions of this court, substantially to the same effect, could be cited. *Eikenberry v. Edwards*, 67 Iowa, 14, cited by the defendant's counsel, is not in conflict with the doctrines we have just announced. The amendment in that case was held not to be allowable, because it presented issues upon which the parties had not been heard. In our opinion, the amendment was rightly permitted by the district court.

III. An instruction complained of by the defendant, to the effect that the limitation of the liability of the defendant authorizing recovery for wearing apparel to the extent of one hundred dollars, and no more, is not effective, is correct. Such limitation is invalid under the statutes of this state. Code, secs. 1308, 2184. The contract under which the trunk was transported was made in Ohio, to be performed in this state. It is not shown that the statutes of Ohio are different from the statutes of this state pertaining to this subject. In the absence of such evi-

dence, we are required to presume that they are to the same purport and effect as our own statutes. *Hadley v. Gregory*, 57 Iowa, 157; *Neese v. Farmers' Ins. Co.*, 55 Iowa, 604; *Church v. Crossman*, 49 Iowa, 444; *Leiber v. Union Pac. Ry. Co.*, 49 Iowa, 688; *Stephens v. Williams*, 46 Iowa, 540; *Sayre v. Wheeler*, 32 Iowa, 559; 31 Iowa, 112; *Crafts v. Clark*, 31 Iowa, 77; 38 Iowa, 237; *Bean v. Briggs*, 4 Iowa, 464.

IV. A witness testified that the plaintiff had, about two years before the loss of the property, four watches. She disposed of two, and retained two, one being lost from the trunk. On cross-examination a witness was asked to state the differences between the watch lost and the other watches. An objection to the question was rightly sustained. We discover no useful purpose in pursuing such an inquiry. Counsel insists that a description of the lost watch, obtained by comparison with the others, may have so identified it as to show that the plaintiff still had it in her possession. No such claim was made upon the offer of evidence, and we cannot think that a description of the watches was intended in the roundabout and indirect way of showing their differences.

V. The same witness was asked to describe the condition of the trunk when he first saw it at the plaintiff's home, after her return. An objection to this evidence was overruled. Counsel now insist that it ought not to have been admitted, as it did not seem to show the condition of the trunk when the plaintiff received it from the defendant at its depot. But the object of the evidence was to show that the trunk was opened by breaking the lock and fastening. We think the evidence competent for that purpose.

VI. One or two other objections to rulings on the evidence are urged upon our attention. We discover no error in them, and think they demand no further notice. The evidence, while conflicting, sufficiently supported the verdict. Surely it did not so fail to support the verdict as to require us to interfere.

We reach the conclusion that the judgment of the district court ought to be AFFIRMED.

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## DAVID UTTERSON v. W. F. CONRAD, Judge.

**Intoxicating Liquors:** VIOLATION OF INJUNCTION: FINE: CONSTITUTIONAL LAW.

*Certiorari to Polk District Court.*

TUESDAY, JUNE 2, 1891.

CERTIORARI to the district court of Polk county to review the legality of the action of that court in judging the petitioner guilty of contempt in violating an injunction, and in entering a judgment that he pay a fine of five hundred dollars and costs, and that he be imprisoned in the jail of the county for one hundred and fifty days, unless the fine be paid.

*W. S. Sickman*, for petitioner.

GIVEN, J.—The only question presented is the constitutionality of section 1543 of the Code as amended by section 12, chapter 143, of the Acts of the Twentieth General Assembly. It is contended that the law, so far as it provides a fine of five hundred dollars and imprisonment, is unconstitutional. This precise question was settled in *Jordan v. Circuit Court of Wapello County*, 69 Iowa, 177, and has been uniformly followed since. We think the action of the district court was in all respects within its jurisdiction, and legal, and the judgment is, therefore, affirmed, and the plaintiff's petition DISMISSED.

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THE STATE OF IOWA, Appellee, v. DAVID DAVIS, Appellant.

**Criminal Law**: REVIEW ON APPEAL.

*Appeal from Appanoose District Court.*—HON. H. C. TRAVERSE, Judge.

WEDNESDAY, OCTOBER 7, 1891.

INDICTMENT for an assault with intent to commit murder. There was a trial, and a verdict for an assault with intent to inflict great bodily injury. From a judgment imposing an imprisonment in the county jail at hard labor for six months and the payment of the costs, the defendant appeals.—*Affirmed.*

No appearance for either party.

GRANGER, J.—The case is before us on a transcript only, showing the indictment, trial, instructions, verdict and judgment of the court. The evidence is not in the record. The proceedings seem to have been regular. The instructions, in so far as we can determine their correctness, in the absence of the evidence, are without error, and seem to be fair to the defendant.

The judgment of the district court is AFFIRMED.

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J. F. SEIBERLING, Appellee, v. ANDREW SCHUSTER, Appellant.

**Setting Aside Judgment**: ABSENCE OF DEFENDANT: APPEAL.

*Appeal from Webster District Court.*—HON. S. M. WEAVER, Judge.

WEDNESDAY, OCTOBER 7, 1891.

ACTION upon a promissory note. The defendant, after pleading more than one defense in his answer, failed to be present when the case was called for trial, and, thereupon, a judgment was entered against him upon the note. A motion by the defendant to set aside the judgment, and permit a trial of the case on the merits, was overruled. From this ruling he appeals.—*Affirmed.*

*Albert E. Clark*, for appellant.

*A. W. Botsford*, for appellee.

BECK, C. J.—I. The defendant, as a defense, pleads that he did not execute the note, and that it is forged; that, if his signature was affixed to the note, it was procured when he was drunk, and incapable of making contracts, and that he received no consideration for the note. The judgment in the case, and the proceedings preliminary thereto, are shown by the abstract in the following language: "And thereafter, at the regular February, 1889, term of said court, which term commenced on February 25, 1889, the said cause was assigned for trial on the afternoon of Wednesday, February 27, that being the first day of the term upon which the jury was summoned to appear, and this case being the second case assigned for that afternoon. On the afternoon of that day, the first case assigned not being for trial, and this case being called, the defendant not being present, judgment was rendered against him on the note in suit." The abstract shows nothing as to the proceedings and trial in the case. What they were, we cannot presume, other or further than that they were in accord with the law. We must presume the judgment was regularly rendered upon pleadings and evidence, or admissions authorizing it. The fact that the defendant was not present at the trial, without more, is not a ground for setting aside the judgment and permitting another trial; and yet this fact is the only ground upon which the motion is based. The defendant shows that he was absent from court because of the sickness of his wife. But it is not shown that there was not a trial had upon the pleadings, evidence or admissions, without objections on account of the defendant's absence, which must be presumed, if it be necessary in that way to support the ruling of the court in overruling the motion.

II. The abstract does not show that the judgment was entered upon default, and that the motion is to set aside the default. The rules applicable in such a case do not control in this. As the abstract fails to show error in the order of the district court overruling the motion, the decision is AFFIRMED.

THE STATE OF IOWA, Appellee, v. ADELAID HENDERSON, Appellant.

**Appeals in Criminal Cases:** SUBMISSION WITHOUT TRANSCRIPT OR ASSIGNMENTS OF ERROR.

*Appeal from Polk District Court.*—HON. MARCUS KAVANAGH, Judge.

WEDNESDAY, OCTOBER 7, 1891.

THE defendant was indicted December 14, 1889, for keeping a house of ill fame; and, having been tried and convicted, and her motion for a new trial overruled on September 8, 1890, judgment that she be imprisoned in the penitentiary at Anamosa for six months was entered; to all of which the defendant excepted, and from which she appeals.—*Affirmed.*

*McHenry & McHenry*, for appellant.

*John Y. Stone*, Attorney General, for the State.

GIVEN, J.—I. This case is submitted without arguments or assignments of error, and upon a partial transcript containing only a copy of the indictment and its indorsements, and the journal entry showing the overruling of the defendant's motion for a new trial and the judgment of imprisonment. The proceedings had upon the trial are not shown, nor is the motion for new trial, nor any of the grounds thereof. The indictment and its indorsements are in due form, and the judgment is as authorized by statute. No errors are pointed out in argument or otherwise, and we fail to discover any upon a careful examination of this partial transcript. Not having the record of the trial before us, we cannot say whether there were errors in the trial or not; and, not having the motion for new trial, we cannot say whether or not the court erred in overruling the same. Numerous criminal cases have recently been appealed from the district court of Polk county, and presented to this court in the same imperfect and unsatisfactory way. We are at a loss to know why such appeals are taken, or, when taken, why they are not prosecuted in the usual manner. Under the liberal practice of this court, allowing cases to be submitted in writing when the party is unable to pay for printing, there would seem to be no excuse for not fully presenting the appeal. If there be any grounds for an appeal, counsel who have undertaken the defense of an accused certainly owe it to their clients to faithfully prosecute the appeal. There may be sufficient reason why this appeal has not been prosecuted in the usual way, but the frequency with which cases have been submitted as this is calls for disapproval by this court.

As we find no error in the proceedings, as shown by the partial transcript before us, the judgment of the district court is AFFIRMED.

THE STATE OF IOWA, Appellee, v. J. T. MCINTOSH, Appellant.

**Appeal:** NOTICE: TRANSCRIPT.

*Appeal from Pottawattamie District Court.*—HON. N. W. MACY, Judge.

WEDNESDAY, OCTOBER 7, 1891.

THE defendant was charged with the crime of obtaining property by means of false pretenses, tried by jury, found guilty, and adjudged to be imprisoned in the penitentiary at Ft. Madison, at hard labor, for the term of one year; from which judgment he appeals.—*Dismissed.*

No appearance for either party.

ROBINSON, J —This case is submitted to us on a voluminous transcript of the record. We have examined it with care, but are unable to find any evidence that an appeal has been taken. The case is, therefore, DISMISSED.

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THE STATE OF IOWA, Appellee, v. B. M. GRAVES, Appellant.

**Liquor Nuisance:** VERDICT: APPEAL.

*Appeal from Polk District Court.*—HON. MARCUS KAVANAGH, JR., Judge.

THURSDAY, OCTOBER 8, 1891.

INDICTMENT for nuisance in maintaining a place for the keeping and selling of intoxicating liquors in violation of law. From a judgment imposing a fine of three hundred dollars and costs, the defendant appeals. *Affirmed.*

No appearance for either party.

GRANGER, J.—The cause is submitted on a partial transcript, which, upon examination, discloses no error against the defendant, and the judgment of the district court is AFFIRMED.

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J. W. WRIGHT, Appellant, v. R. G. SAUER AND THE SIBLEY LOANING COMPANY, Intervener, Appellees.

**Mortgage on Growing Crops:** SALE: NOTICE.

*Appeal from Lyon District Court.*—HON. G. W. WAKEFIELD, Judge.

FRIDAY, OCTOBER 9, 1891.

ACTION to recover the value of certain wheat by virtue of landlord's lien thereon. Judgment for the intervener, and the plaintiff appealed.

*D. D. McCallum*, for appellant.

*O. J. Clark*, for intervener.

GRANGER, J.—The facts of this case, and the law applicable thereto, are substantially like those in *Wright v. E. M. Dickey Co.*, *ante*, p. 332; and, following that case, the judgment in this is AFFIRMED.

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CARSON & RAND LUMBER COMPANY, Appellee, v. GEORGE W. BUNKER *et al.*, Appellants.

## Unrecorded Chattel Mortgage: ACTUAL NOTICE: BURDEN OF PROOF.

*Appeal from Keokuk Superior Court.*—HON. HENRY BANK, JR., Judge.

TUESDAY, OCTOBER 13, 1891.

THIS is an action in equity to foreclose a chattel mortgage upon certain personal property. There was a decree for the plaintiff, and the defendant Bunker appeals.—*Affirmed.*

*Laughlin & Campbell*, for appellant.

*J. F. Smith*, for appellee.

ROTHROCK, J.—The evidence shows that on the twentieth day of March, 1889, the defendant Embree executed and delivered a chattel mortgage to the plaintiff upon the property in controversy. The said mortgage was filed for record in the recorder's office of the proper county, on the twenty-second day of the same month. There is no question about the validity of the mortgage. It was given for a full consideration; and for default in payment of the debt, or for any attempt to remove or dispose of the property, the plaintiff was, by the terms of the mortgage, authorized to take possession of the same, and remove and sell it, and out of the proceeds retain the amount of the debt and expenses, and pay the surplus, if any, to said Embree. These provisions of the mortgage plainly implied that the property was owned absolutely by Embree. The fact appears to be that the said Embree had before that, and on the twentieth day of February, 1889, executed and delivered to the defendant Bunker a chattel mortgage on the same property. But the last-named mortgage was not filed for record until the thirtieth day of March, 1889, some eight days after the filing of the plaintiff's mortgage. The only question to be determined is, which of the mortgages is the prior lien upon the property.

Upon the face of the record, the plaintiff's mortgage is prior, because it was first filed for record. But the appellant contends that the plaintiff had notice, when the mortgage to it was executed, that the property had before that been mortgaged to Bunker. The burden was on the defendant Bunker to establish this alleged fact by a preponderance of evidence. The court below was of the opinion that the defendant failed to maintain the issue. We have carefully examined the evidence, and reach the same conclusion. We need not set out the testimony of the witnesses, nor further elaborate the case.

The decree of the superior court is AFFIRMED.

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WALTER ORDWAY, Appellee, v. L. D. KITTLE, Appellant.

**Execution**: CLAIMS OF THIRD PARTIES: CHATTEL MORTGAGES: UNCERTAINTY IN DESCRIPTION.

*Appeal from Monona District Court.*—HON. C. H. LEWIS, Judge.

WEDNESDAY, OCTOBER 14, 1891.

REPLEVIN to recover the possession of certain cattle. There was a verdict, and a judgment thereon, for the plaintiff. The defendant appeals. *Affirmed.*

*M. B. Baily* and *Charles MacKenzie*, for appellant.

*McMillan & Kendal* and *L. R. Bolter & Sons*, for appellee.

BECK, C. J.—I. The plaintiff held a chattel mortgage executed by Wood upon certain cattle owned by him. One Jones recovered a judgment against Wood, upon which an execution was issued and delivered to the defendant, the sheriff of the county, who levied it upon the cattle in question. Thereupon, the plaintiff commenced this action to recover the cattle, claiming the right to hold them under the mortgage.

II. It is not disputed that the chattel mortgage is void for uncertainty in the description of the property. But the plaintiff herein insists that, as the plaintiff in execution, Jones, levied upon the property, and his agent and attorney, before the levy, had actual notice of the mortgage, and that the plaintiff claimed to hold the property under it, the instrument, though uncertain and indefinite, is valid as between the parties, and gives to the plaintiff the right to the property as against the execution. *Clapp v. Trowbridge*, 74 Iowa, 550; *Plano Mfg. Co. v. Griffith*, 75 Iowa, 102. Counsel for the defendant maintain that there was no sufficient evidence to authorize the jury to find that the plaintiff in execution, or his agent, had notice of the mortgage, and of the plaintiff's claim under it, and that the district court erred in overruling a motion for a new trial based upon that ground. We think the evidence on this point sufficiently

supports the verdict. At all events, it cannot be said that there was such lack of evidence as to authorize the conclusion that the verdict is the result of passion or prejudice. The agent of the plaintiff in execution had in his possession a copy of the mortgage, and claimed that it was insufficient. It sufficiently appears that he knew the plaintiff claimed the property under that mortgage.

III. The district court admitted the mortgage in evidence over the objection of the defendant's counsel, based upon its uncertainty. The abstract shows that the mortgage was admitted "subject to proof of actual notice." Actual notice being shown, the mortgage became valid between the parties. The court rightly admitted the mortgage in evidence upon the offer to follow it with proof of actual notice, which was doubtless made. It would be difficult to show actual notice of the mortgage until it was in evidence. At all events, it was properly admitted, subject to proof showing its validity as between the parties.

These views dispose of all the questions discussed by the defendant's counsel. The judgment of the district court is AFFIRMED.

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THEOBOLD LAPRELL, Appellee, v. ANTON JAROSH, Appellant.

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90 230
83 753
112 135
83 753
d122 44

**Appeal:** NOTICE TO COPARTIES: DISMISSAL.

*Appeal from Winneshiek District Court.*—HON. L. E. FELLOWS, Judge.

WEDNESDAY, OCTOBER 14, 1891.

ACTION in equity for the assignment of dower. From a decree for the plaintiff, the defendant appeals.—*Dismissed.*

*G. W. Adams,* for appellant.

*J. B. Kaye,* for appellee.

GRANGER, J.—The defendants are four in number, as the cause was tried in the district court. The plaintiff's petition represented that he was, in her lifetime, the husband of Dorothea Laprell, who died seized of certain real estate, in which he claimed a distributive share of one-third. The defendants joined in an answer, in which they put in issue the right of the plaintiff to any interest in the land. A demurrer to the answer was sustained; and, the defendants electing to stand on the answer, judgment was entered for the plaintiff against all the defendants. The defendant, Anton Jarosh, alone appealed. No notice of appeal was served on his codefendants, against whom the judgment was rendered, and for this reason the plaintiff moves to dismiss the appeal.

Code, section 3174, provides: "A part of several coparties may appeal, but in such case they must serve notice of the appeal upon all the other coparties, and file the proof thereof with the clerk of the supreme court." The legal effect of this action is the partition of real estate, and it does not appear from the record that the interests of the appellant, and of the plaintiff, can be adjudicated without affecting the interests of the other defendants. The appeal is, therefore, invalid. *Hunt v. Hawley*, 70 Iowa, 183. It may further be said that no resistance is made to the motion.

The appeal is DISMISSED.

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THE STATE OF IOWA, Appellee, v. THOMAS BROOKS, Appellant.

**Appeal**: WANT OF NOTICE : DISMISSAL.

*Appeal from Pottawattamie District Court.*—HON. N. W. MACY, Judge.

FRIDAY, OCTOBER 16, 1891.

No appearance for either party.

BECK, C. J.—The defendant was indicted and convicted of murder in the first degree, and sentenced to imprisonment for life in the state penitentiary. As it is not shown an appeal has been taken, for the reason that no notice of appeal is shown to have been made, served upon the attorneys who acted as the attorneys of record in the district court at the time of the rendition of the judgment, as required by Code, section 4523, we cannot take jurisdiction of the case. It is, therefore, stricken from the docket.

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THE STATE OF IOWA, Appellee, v. WILLIAM HENDERSON, Appellant.

**Assault**: VERDICT: APPEAL.

*Appeal from Polk District Court.*—HON. A. W. WILKINSON, Judge.

FRIDAY, OCTOBER 16, 1891.

*John Y. Stone*, Attorney General, for the State.

No appearance for appellant.

BECK, C. J.—The defendant was indicted and convicted for an assault with intent to commit murder, and sentenced to the state peniten-

tiary for three years, and now appeals to this court. The transcript of the record before us shows no other proceedings in the case, except the indictment and record entry of judgment, in which no irregularities or errors appear. The judgment, therefore, must be AFFIRMED.

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LUND & SMITH BROS., Appellees, v. E. H. MCCUTCHEN, Appellant.

**Contract:** CONSTRUCTION.

*Appeal from Ida District Court.*—HON. JAMES H. MACOMBER, Judge.

MONDAY, OCTOBER 19, 1891.

THIS is an action for an amount claimed to be due upon a written contract between the parties by which the plaintiffs sold to the defendant a stock of hardware and machinery. There was a demurrer to the petition, which was overruled. The defendant excepted to the ruling and stood upon his demurrer, and from a judgment rendered against him he appeals.—*Reversed.*

*Warren & Buchanan*, for appellant.

*R. H. Smith* and *Bradshaw & McGiffin*, for appellees.

ROTHROCK, J.—The question involved in this appeal arises upon the construction which the respective parties claim should be given to the written contract. It appears from the contract that the terms of the sale were fixed thereby, so far as they could be, without an invoice. It was provided, first, that all the goods in the front room of the hardware store should be invoiced to the defendant at cost price, to be determined by the original bills of said goods and by invoice. Tinware was to be invoiced at regular list price and discounts. All wagons not held on commission were to be taken by the defendant at cost. The tinner's tools were to be taken at the sum of two hundred dollars. The furniture and fixtures of the store, which were in good condition, were to be taken at cost, without freight. The contract then provides as follows: "All other stock, being the balance of stock on hand at time of invoice, to be invoiced, where in a salable condition, at cost price to party of the first part, with eight per cent. on net cost price added for freight on same, except such goods as are bought free of freight."

This action is founded upon the claim that, under the written contract, the defendant was bound to pay eight per cent. on the net cost price, as provided in the extract from the contract above set out. The part of the contract relating to binding twine is as follows:

"Party of the second part agrees to take all the binding twine in store belonging to party of the first part at date of invoice, the same to be receipted for by party of the second part at the date of invoice; the price

and terms of payment of said twine to be determined by the price at which the Deering Machine Company and the McCormick Machine Company shall sell twine of the same quality to dealers for the year 1889; price to be fixed on or about February 1, 1889. Party of the first part agrees to pay party of the second part the amount of premiums of insurance on said twine, same to be computed *pro rata* with annual premiums on other stock at same rate, and to begin on completion of invoice and continue till June 1, 1889."

The contract was entered into on the twentieth day of September, 1888, and it appears from the averments of the petition that at that time the plaintiff had in stock about nine thousand pounds of binding twine, and that the price of the same, when ascertained in the manner fixed by the contract, amounted to fourteen hundred and thirty-three dollars and forty cents. The plaintiffs claim that they are entitled to eight per cent. on this amount for freight. This claim is founded on that provision of the contract providing for eight per cent. to be added for freight on all stock other than that previously enumerated. If there were nothing in the contract qualifying this stipulation, the plaintiffs would be entitled to the eight per cent. on the cost price "to party of the first part." This clause of the contract expressly provides that the eight per cent. shall be added to the cost price of that part of the stock referred to, and it also contemplates that said stock shall then be invoiced. But the stipulation which follows in regard to the binding twine is manifestly a special provision, having no reference to the net cost of the twine when it was purchased by the plaintiffs. The price to be paid for it was to be ascertained in an entirely different manner. The price and terms of payment, as between the parties to the contract, were to be determined by the price at which the machine companies named should sell twine of the same quality to dealers for the year 1889, to be fixed on or about February 1 of that year. This is a specific means by which the price is to be ascertained. It has no reference to freight to be added, nor to the price which the plaintiffs paid for the twine. It was their property,—stock on hand,—and presumably paid for, and the price paid was not the standard by which it was sold to the defendant. It appears to us very plain that the clause of the contract providing for eight per cent. added had no reference to the binding twine. It applies to such stock only for which the defendant was to pay cost price.

The demurrer to the petition should have been sustained. REVERSED.

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AUGUST ZABEL, Appellee, v. MRS. J. B. NYENHUIS, Appellant.

**Continuance**: ABSENCE OF ATTORNEY: POLICY OF INSURANCE HELD AS SECURITY: CONTRACTS IN WRITING: PAROL EVIDENCE.

*Appeal from Muscatine District Court.*—HON. C. M. WATERMAN, Judge.

MONDAY, OCTOBER 19, 1891.

ACTION in equity for an accounting and the specific performance of an agreement to convey real estate. There was a hearing on the merits, and a decree in favor of the plaintiff. The defendant appeals.—*Affirmed.*

*E. F. Richman*, for appellant.

*Jayne & Hoffman*, for appellee.

ROBINSON, J.—On the fourteenth day of March, 1887, the parties to this action entered into the following agreement:

"This indenture and agreement made this fourteenth day of March, by and between Mrs. J. B. Nyenhuis, of the first part, and August Zabel, of the second part, for the sum of seven hundred and thirty-five dollars, to be paid to Mrs. J. B. Nyenhuis, of the first part, by August Zabel, of the second part, as follows: [Fifteen notes are here specified] for house number 1027, on Lucas Grove road, opposite the cemetery, adjoining Exo, on the west, leaving twenty feet next to Exo for street, and, then, the lot is to be forty feet wide by one hundred and forty feet long; and said August Zabel, of the second part, is entitled to a clear and warranty deed of the same property here before mentioned as soon as he has the same notes here before mentioned in hand.

"[Signed] MRS. J. B. NYENHUIS,
"AUGUST ZABEL."

When this agreement was made the plaintiff paid to defendant sixty-five dollars in money, and delivered to her the notes specified, amounting to seven hundred and thirty-five dollars. He afterwards took possession of the property, made some improvements on it, and occupied it as a home for himself and family until the third day of January, 1889, when the dwelling-house was destroyed by fire. Before that time the plaintiff paid two of the notes he had given to the defendant, amounting to eighty-five dollars, and interest on the remaining notes, to the amount of forty-five dollars and fifty cents. When the agreement was made the defendant held a policy of insurance on the house against loss by fire for seven hundred and fifty dollars, which had been issued for a term of five years, commencing in January, 1884. After the house was destroyed she collected on the policy the sum of seven hundred and thirty dollars. The plaintiff seeks an accounting for the money so collected; asks to have it applied so far as required to the payment of the notes given by him to the defendant; demands judgment for the remainder for the surrender of the notes, and for a conveyance of the property to him. The court rendered judgment in favor of the plaintiff for thirty-nine dollars and fifty cents, and interest thereon at six per cent. per annum, from March 14, 1889, and required the defendant to surrender the thirteen notes in her hands, and to execute to the plaintiff a warranty deed for the property, subject to the taxes of 1889. The petition sets out a copy of the agreement, and alleges that the policy of insurance, by arrangement between the parties, was permitted to stand

in the name of the defendant, as further security for the payment of the notes given for the purchase price for the benefit of the plaintiff, and when it expired the property was to be reinsured at his expense. The answer denies that any arrangement in regard to the insurance was made; denies that the plaintiff had any interest in the insurance money collected; and denies that the defendant is under any obligation to account for it. She asks, by way of counterclaim, for judgment for so much of the notes now held by her as is due, and for the foreclosure of the agreement. By an amendment to her answer the defendant claims that, since the filing of her original answer, she and the plaintiff have settled the matter in litigation; that by the terms of the settlement the plaintiff executed a deed for the property to her, and received from her a receipt in full for all demands; and she was to deliver the thirteen notes in question at a certain office for him, which she has done. She asks that the settlement be enforced. The alleged settlement is denied by the plaintiff.

I. This cause was regularly reached for trial in the district court on the eighth day of May, 1890. At that time the defendant filed an application for a continuance until the next week, on the ground of the absence of D. M. Lambert, the attorney to whom the care of the case on her part had been intrusted from its commencement. The affidavit alleged that Lambert had a more particular knowledge of the facts of the settlement pleaded and of its terms, than any other person; that he had not been subpœnaed because he was the attorney for the defendant, and it was supposed would be present if needed; and for the further reason that she relied upon the settlement, and had no reason to believe that it would be denied. The record shows that this cause was set down for trial on the eighth day of May, 1890, under a rule of the court several weeks before that date. The defendant, therefore, had ample time in which to prepare for trial, but she did not file her amendment, pleading the settlement, until the day the cause was reached for trial, and shows no diligence whatever to procure the attendance of the witness. His negligence in failing to appear, under the circumstances of the case, must be imputed to her. It was his duty, as her attorney, to have himself present as a witness, if needed. We think the application for a continuance was properly overruled.

II. The evidence as to the alleged settlement shows that it was attempted, but never completed. The plaintiff signed a quitclaim deed to the defendant for the premises, and it was understood that his wife would also sign it. But some of the details of the settlement were never agreed upon, and the defendant did not comply with its terms on her part. We do not think it was so far effected that it can be enforced.

III. When the agreement of sale had been made, the defendant had no interest in the property sold, excepting the right to have it treated as security for the payment of the purchase price. That interest was insurable, and it would be presumed, in the absence of satisfactory evidence to the contrary, that she continued to hold the policy to protect her interest, and not for speculative purposes. But the evidence satisfies us that it was understood, and in effect agreed, between the parties to the agreement that the policy of insurance should be permitted to remain in the name of

the defendant as security for the notes of the plaintiff which she held, and which were the measure of her interest in the property.

It is objected that the agreement is silent as to the matter of insurance, and that parol evidence is not competent to vary or contradict the writing, but that it must be presumed to contain all of the agreement of the parties. In answer to that, it may be said that the petition fully disclosed the facts in regard to the agreement as claimed by the plaintiff. It was not in any manner attacked, the defendant contenting herself with denying its averments. The evidence submitted to show that the policy was to be held as security, and for the benefit of the plaintiff, was verbal. To some of it the objection was made that it was immaterial, but no claim was made that it was incompetent. It was certainly material to the issues presented by the pleadings, and the defendant cannot be permitted to urge in this court, for the first time, that it was incompetent. Objections to evidence must be first made in the trial court, even though not ruled on there. *Davis v. Nolan*, 49 Iowa, 686. It is the right of each party to know what objection, if any, exists to his evidence when offered, that he may take the steps necessary to cure the defect, if one exists, or to otherwise avoid the objection.

The findings of the district court have ample support in the evidence, and the decree is, therefore, AFFIRMED.

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W. H. STIVERS, Appellee, v. E. L. CARMICHAEL, Appellant.

**Corporations:** LIABILITIES OF STOCKHOLDERS.

*Appeal from Tama District Court.*—HON. G. M. GILCHRIST, Judge.

TUESDAY, OCTOBER 20, 1891.

ACTION against an incorporator and stockholder of a corporation to recover for a debt contracted by the corporation, on the ground that the provisions of the statute relating to the organization of corporations, and notice thereof, were not complied with. There was a judgment for the plaintiff, from which the defendant appeals.—*Affirmed.*

*Struble & Stiger*, for appellant.

*W. H. Stivers, pro se.*

BECK, C. J.—The facts of this case are like those involved in *Heuer v. Carmichael*, 82 Iowa, 288, and the principles of law arising in the two cases are identical. This is admitted by counsel for the defendant, and it is conceded that the conclusions in that case are decisive in this. The decision of the district court in this case is AFFIRMED.

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89 676

ANHEUSER-BUSCH BREWING ASSOCIATION, Appellee, v. NIXON FULLERTON, Sheriff, Appellant.

**Intoxicating Liquors**: INTERSTATE COMMERCE: SEIZURE BY SEARCH-WARRANT: JUSTICE JURISDICTION: REPLEVIN.

*Appeal from Des Moines District Court.*—HON. CHARLES H. PHELPS, Judge.

THURSDAY, OCTOBER 22, 1891.

THIS is an action of replevin for one hundred and thirty-three kegs of beer. There was a trial by jury. At the close of the introduction of the evidence the defendant made a motion that the jury be instructed to return a verdict for the defendant. This motion was overruled, and a motion of the plaintiff to instruct the jury to return a verdict for the plaintiff was sustained. The defendant appeals.—*Reversed.*

*Newman & Blake*, for appellant.

*A. M. Antrobus* and *Wm. C. McArthur*, for appellee.

ROTHROCK, J.—This case presents precisely the same questions which were determined by this court in the case of *Lemp v. Fullerton, ante*, p. 192. We need not set out the facts nor reasoning upon which that opinion is based. Following that case the judgment of the district court will be reversed, and the cause remanded, with directions to enter judgment for the defendant for the value of the beer as shown by the petition, which is three hundred and seventy dollars. REVERSED.

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F. J. SMOLA, Appellee, v. O. H. MCCAFFREY, Sheriff, Appellant.

83b 760
87 458
83b 760
98 111
83b 760
106 209
83 760
Case 2
114 181
83 760
118 559

**Appeal**: ASSIGNMENT OF ERRORS: MUST SPECIFY ERROR COMPLAINED OF.

*Appeal from Jackson District Court.*—HON. C. M. WATERMAN, Judge.

FRIDAY, OCTOBER 23, 1891.

THE plaintiff was a judgment debtor, the head of a family, having a wife only, and the occupant of a homestead which was sold on special execution to satisfy a judgment lien thereon. After the satisfaction of the execution there remained in the hands of the sheriff, the defendant, a surplus which he applied in satisfaction of another execution in his hands against the plaintiff. The wife of the plaintiff had previously obtained a divorce from him. The issues involve the question of the exemption of the surplus from execution because it was the proceeds of the homestead of plaintiff. Judgment was by the district court given for the plaintiff, and the defendant appeals.—*Affirmed.*

*D. A. Fletcher*, for appellant.

*Johnson & Kelsey*, for appellee.

GRANGER, J.—The proceeding is at law, and the assignments of error are as follows. "Assignment of errors: And the appellant says there is manifest error on the face of the record in this cause in this: *First.* The judgment of the court in finding for the plaintiff is against the evidence, as shown by the agreed statements of facts submitted by the parties. *Second.* The judgment of the court in finding for the plaintiff is against the law applicable to the facts shown by the agreed statement of facts submitted by the parties. Said judgment should have been for the defendant. *Third.* The court erred in rendering judgment for the plaintiff." The appellee insists that the assignments are too general to entitle the appellant to a consideration of them, and the point must be sustained. With these assignments it is impossible to know the error relied upon to reverse the judgment, except by a resort to the arguments. Code, section 3207, provides that the assignment must "point out the very error objected to," and "in a way as specific as the case will allow;" and by the same section we are required to disregard errors not "assigned with the required exactness." If we are to resort to arguments by counsel to show the questions we are to consider, there is no utility in the law requiring an assignment of error in the abstract. We are aided equally as much by the third assignment in this case as by the others, and such an assignment has been held insufficient too many times to need a new citation of authority. See, however, *Tomblin v. Ball*, 46 Iowa, 190. The appellee's point must be sustained, and because of a failure to properly assign errors the judgment must be AFFIRMED.

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M. RILEY, Appellee, v. TOWN OF IOWA FALLS, Appellant.

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92 716

**Defective Streets:** EVIDENCE: DAMAGES: IMPROPER REMARKS IN ARGUMENT TO JURY: COSTS ON APPEAL.

*Appeal from Hardin District Court.*—HON. J. L. STEVENS, Judge.

FRIDAY, OCTOBER 23, 1891.

ACTION to recover for personal injuries incurred from a fall caused by a defective sidewalk. There was a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*C. E. Albrook*, for appellant.

*J. H. Scales*, for appellee.

BECK, C. J.—The objections to the judgment will be considered in the order of their discussion in the printed argument of the defendant's counsel.

I. It is insisted that the evidence does not sufficiently establish the existence of a defect in the sidewalk, which is the ground of the plaintiff's claim, and that the defendant was chargeable with notice of such defect. The sufficiency of the evidence is discussed in two or three divisions of the argument. In our opinion, counsel's position, which is argued at considerable length, is not sustained by the abstract. It is clearly shown that the sidewalk, which was of plank, was decayed and out of repair. The accident resulted from a plank, when stepped upon by one walking with the plaintiff, flying up and tripping him. It is insisted that this identical plank was not shown to have been loose before the accident. This may be admitted. But it was shown that the planks along the place of that accident were loose and decayed; that the plank causing the injury was old and decayed; and the stringers upon which it was laid were not in good order. The nails in it did not keep it in place. The walk had been in the condition indicated by the fact that the planks were partly loose or decayed for several months, and a member of the city council had been informed of the insufficient condition of the sidewalk about the place of the accident. We think the evidence authorized the jury to find that the sidewalk was defective, of which the defendant had notice. At least it cannot be said that the verdict is so without the support of evidence as to authorize the conclusion that it is the result of passion or prejudice, and not the exercise of the intelligent and honest discretion of the jury.

II. Counsel seems to question the claim of the plaintiff made as to his injuries. They were about the face, and, while not permanent, were severe.

III. Counsel complained of the rulings upon the admission of evidence as to the defective sidewalk, repairs thereon, and the like. We discover no error in these rulings, and think the objections demand no further attention.

IV. Instructions are complained of on the ground that there is no evidence to which they are applicable. We think the objections are not well taken. One instruction is complained of on account of language which we do not find in it. We think the instructions are unobjectionable.

V. It is urged that the verdict is excessive. The plaintiff had severe injuries to his face and head. One of his teeth was loosened by the fall. The verdict was for three hundred dollars. It surely is not subject to the objection of being excessive.

VI. Counsel for the defendant upon the argument was proceeding to comment upon an amended petition as to the construction and condition of the walk, but was directed by the court to suspend his comments. An amended abstract of the appellee, which is not denied, shows that this amendment to the petition, the foundation of the comments, had been withdrawn. It was not a subject for discussion by counsel, for it was not a pleading in the case.

VI. The defendant files a motion to tax the costs of the amended abstract filed by the plaintiff to him. It is overruled. We think the

amendments were rightly made, in order to present with sufficient correctness and fulness the facts of the case. The judgment of the district court is AFFIRMED.

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GEORGE W. FULLIAM, Appellant, v. ROBERT HAGENS, Appellee.

**Replevin:** EVIDENCE: INSTRUCTIONS.

*Appeal from Muscatine District Court.*—HON. C. M. WATERMAN, Judge.

SATURDAY, OCTOBER 24, 1891.

ACTION to recover possession of a sorrel pony called "Dandy." Each party claims to be the absolute owner, and, as such, entitled to the immediate possession of the pony. The case was tried to a jury, resulting in a verdict and judgment for the defendant. The plaintiff appeals. *Affirmed.*

*E. F. Richman*, for appellant.

*Cloud & Doran*, for appellee.

GIVEN, J.—I. The right to the possession of the sorrel pony in controversy rests upon the ownership thereof, and the ownership upon a determination of the terms of a certain contract made by the parties. They made an exchange of horses, the defendant giving his to the plaintiff for five dollars and a certain mare, thereafter to be delivered to the defendant, and which he had never seen. The defendant alleges that the plaintiff represented that the mare was as good as the pony "Dandy," and that it was agreed that if she was not the defendant should have the right to take the pony. He alleges that the mare was crippled and worthless, and that for that reason he did take the pony in controversy. The plaintiff denies these allegations. The appellant's first contention is that the verdict is against, and not supported by, the evidence. There is a marked conflict in the evidence as to what the agreement was. Under the uniform rulings of this court the verdict will not be disturbed as being against or not supported by the evidence when there is a conflict in the evidence. These parties testified directly opposite as to what the agreement was. It was for the jury to determine to what extent either was corroborated or contradicted, and the weight to be given to the testimony. We cannot say that the verdict is not supported by the evidence.

II. The appellant complains of certain rulings of the court in admitting and rejecting testimony. On cross-examination the plaintiff was permitted to state that the defendant had never got back the horse he gave to the plaintiff. There was no error in this, as it tended to show that there had been no rescission of the agreement. On cross-examination the plaintiff stated that he had had the use of the horse he got from

the defendant. "He is a horse I would not want to drive after dark; a heavy horse." In view of the contention as to what the agreement was it was proper to show that the plaintiff had the use of the horse which he got in the trade, and there was no error in striking out, on the defendant's motion, that part of the answer quoted, as the qualities of that horse were not in issue. On re-examination the plaintiff was not permitted to state the value of the use of this horse if he had had no other horse to put in his place. The value of the use was not dependent upon whether the plaintiff had other horses or not. The defendant was permitted to state, over the plaintiff's objection, that the mare never came into his possession. If the agreement was as claimed by the defendant, it was certainly competent to prove that he never received the mare.

III. Appellant complains of the fourth paragraph of the court's charge "as inapplicable to any material testimony." The paragraph submits with clearness the issue joined in the answer and reply, and instructs the jury that the burden of proving that the mare was not as represented was upon the defendant. The appellant also complains of the refusal to give an instruction asked, based upon the theory that the agreement had been rescinded. There was no such issue joined in the pleadings, and, therefore, the instruction was properly refused. We find no error in either of the respects assigned.

The judgment of the district court is, therefore, AFFIRMED.

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DANIEL PIERCE, Appellee, v. DAVID HERROLD *et al.*, Appellants.

83 764
110 518

**Appeal:** RECORD: REVIEW.

*Appeal from Sac District Court.*—HON. J. P. CONNOR, Judge.

MONDAY, OCTOBER 26, 1891.

ACTION to foreclose a mortgage. The petition, in substance, shows that the defendant Herrold made to the plaintiff his note for two thousand dollars, secured by mortgage on four hundred acres of land; that three hundred and twenty acres of the land were purchased by Herrold of the defendant Early under a deed with covenants of warranty. Early's title was adjudged void in a proceeding of Barke against Early, prior to the commencement of this suit. The decree in the suit adjudging the title void was conditional upon the repayment to Early of certain taxes paid by him on the land. The petition in this case asks for judgment and decree of foreclosure against Herrold, and for judgment against Early for one thousand and sixty dollars, actually paid by Herrold to Early as a consideration for the deed; and also for the amount refunded to Early as taxes paid by him, if payment thereof shall be made, and, if not, that he have his decree against the land conveyed by Early to Herrold. The district court entered a decree in substantial accord with the prayer of the petition. The defendant Early appeals.—*Affirmed.*

*James H. Tait,* for appellants.

No appearance for appellee.

GRANGER, J.—The specific complaint on the appeal is as to the judgment of the court granting the relief to the plaintiff against the money to be refunded to the defendant Early because of taxes paid by him. The record in the case will not justify our consideration of the question. No answer is filed in the case, and, hence, no issue was formed for trial. The abstract recites by agreement that it "contains all the pleadings filed in the action, and also all the evidence offered by the respective parties to said cause, or received by the court on the trial of the cause." There are other defendants than those named in the title above, and the decree of the court recites that the defendant Herrold and others "are adjudged to be in default for want of an answer or appearance," and as to the defendant Early and others it recites that, they "having entered their personal appearance herein, * * * the court proceeded to hear the evidence in the case, from which it found," etc., reciting the facts upon which its judgment is based. The abstract, notwithstanding the statements as to its contents, contains only the petition, decree and notice of appeal. It fails to show an issue joined. By the terms of the decree the facts were found from "the evidence in the case." The decree recites certain facts, but does not purport to recite all the facts. To the extent of the facts found no evidence was necessary with no issue, for the facts would be admitted. Code, sec. 2712. The evidence, if in the record, might justify the finding of other facts to sustain the decree, even if those recited would not. The defendant Early was in court, but made no objections to the procedure, and should not and does not complain of that. The parties have stipulated as to the record, but not as to the facts, and, in the absence of the evidence, we must assume facts to support the judgment. The case in principle is very much like *White v. Kelley,* 23 Iowa, 275. The judgment is AFFIRMED.

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THE STATE OF IOWA, Appellee, v. AL. HENDERSON, Appellant.

**Appeal:** RECORD: ERROR.

*Appeal from Polk District Court.*—HON. S. F. BALLIET, Judge.

TUESDAY, OCTOBER 27, 1891.

INDICTMENT for burglary, and from a judgment of imprisonment in the penitentiary the defendant appealed.—*Affirmed.*

No appearance for either party.

GRANGER, J.—The case is before us on a partial transcript showing an indictment for burglary, a verdict and judgment of imprisonment for three years in the penitentiary. The record of the trial is not before us, except as to a motion to set aside the verdict, and for a new trial, which was overruled. An examination of the record before us shows no error, and the judgment of the district court is AFFIRMED.

# INDEX.


ACCOUNTING.

STATUTE OF LIMITATION.

*Guardian and ward—laches.* Where a ward delayed for more than twenty years after attaining her majority to ask an accounting with her guardian, and the evidence showed that the latter had made a settlement with the court, though the record thereof was informal, *held*, that the ward's action for an accounting was barred by the statute of limitations. *Heath v. Elliott, 357.*

BETWEEN PARTNERS. See Partnership, 4, 5, 6.

ACTION.

RIGHT OF.

1. *Void contract—deposits in lieu of bail—payment to sheriff.* An agreement by a sheriff to accept a sum of money in lieu of bail from a prisoner in his custody, and deposit the same with the clerk of the district court, is invalid, and no right of action can accrue thereon to either the state or county for the recovery of said money. *State v. Farrell, 661.*

2. *Damages—conversion of crops by lessee—liability to grantee under sheriff's deed.* A lessee of land is not entitled to the protection of the provisions of section 3264 of the Code as against an action to recover damages for the wrongful conversion of pasturage and crops raised upon the demised premises after the execution and delivery of a sheriff's deed to the plaintiff in said foreclosure proceeding, and an action for damages based upon such conversion may be maintained by the owner of the premises under sheriff's deed while the lessee is in possession, and before an action to recover the demised premises has been commenced. *Stanbrough v. Cook, 705.*

3. *Railroads—occupation of city streets—damage to abutting property.* Where under authority from a city council a railway company lays its track in one of the streets of the city, the fee-simple title to which is in the public, no cause of action for damages accrues to the owner of abutting property under section 464 of the Code, because of such occupation of the street, unless his property has been actually damaged thereby. *Cook v. Chicago, M. & St. P. Ry. Co., 278.*

ACTION. RIGHT OF. *Continued.*

4. *Quieting title—sale of county lands—board of supervisors.* It appearing that the sale of the lands in controversy was duly made by the board of supervisors to the plaintiff, *held*, that the title of the plaintiff was sufficient as a basis of recovery against the defendant, though the deed received from the board was defective. *Hays v. McCormick, 89.*

5. *Quieting title—homestead—conveyance by husband—adverse possession.* Ten years of continuous, open, notorious and adverse possession of real estate under a claim of right based upon a contract for a deed to a part of a homestead, executed by the husband alone, is sufficient to entitle the holder to maintain an action to quiet his title as against the homestead interests of the wife. *Boling v. Clark, 481.*

6. *Warranty of title—sale of land for taxes.* After an adjudication that the plaintiff had no title to certain lands under a deed from the defendant the same was sold for taxes, and subsequently a tax deed issued. *Held*, that the right of action upon the defendant's covenant of warranty was not thereby lost to the plaintiff. *Bellows v. Litchfield, 36.*

See Contracts, 16; Mistake, 1, 2, 3; Slander, 1, 2; Sales, 8.

NECESSARY PARTIES.

7. *Garnishment—attacking title of garnishee.* In a garnishment proceeding wherein it was sought to charge the garnishee with the possession of notes and bonds belonging to the judgment debtor, and alleged to have been transferred to him to hinder and delay the creditors of the latter, but which the garnishee claimed to have purchased of P. and W. through the judgment debtor as agent for the assignors, *held*, that P. and W. were not necessary parties. *Capital City Bank v. Wakefield, 46.*

WHEN DEEMED COMMENCED.

8. *Limitation of actions—construction of statute.* In an action upon a promissory note properly commenced in a county other than that in which the defendant resides, as in the county where the note is, by its terms, made payable, the delivery of an original notice to the sheriff of such county, with the intention that it be served immediately, will be sufficient to stop the running of the statute of limitation as to said action, although the service of such notice was made upon the defendant in the county of his residence, after the action had become barred. *Bracken v. McAlvey, 421.*

PREMATURELY BROUGHT.

9. *Abatement.* A provision in an insurance policy against fire, that in case of loss the amount thereof shall be payable within sixty days after notice and proofs of loss have been received at the office of the company, will not entitle the insured to commence an action on such policy before the expiration of ninety days after giving notice of

ACTION. PREMATURELY BROUGHT. *Continued.*

the loss, as provided by section 3, of chapter 211, of the Acts of the Eighteenth General Assembly, and an action brought upon a policy before the expiration of such time may be abated by a motion in arrest of judgment. *Taylor v. Merchants & Bankers' Ins. Co., 402.*

AGENCY.

AUTHORITY OF AGENT.

1. *Acts in excess of authority—knowledge of principal.* Where an agent acts in excess of his authority with the knowledge of his principal, and the latter remains silent while third persons are influenced thereby, the acts of the agent will be binding upon the principal. *First Nat. Bank v. Moore, 740.*

2. *Fire insurance—representations of applicant.* Where an applicant for fire insurance truthfully answered all material inquiries in regard to the property he desired to have insured, but the agent of the insurer incorrectly recorded such answers in the written application, and the same was signed by the applicant without reading, and without knowledge that his answers had not been correctly recorded, *held*, that the insurer was bound by the acts of its agent, and that it could not escape liability upon the policy of insurance issued upon such application on account of the apparent mis-statements therein. *McComb v. Council Bluffs Ins. Co., 247.*

3. *Lease of lands—validity.* The mother of H., being the owner of the forty acres of land in question, the taxes upon which had been paid by the latter, authorized H. to lease the land, or sell the grass thereon, and thereby reimburse himself for the payment of taxes thereon, but stated that she would rather pay the taxes herself than to have the land so leased as to prevent a sale of the land. In pursuance of such authority H. leased the land to plaintiff in March for one year, making the lease in his own name, and in the following May his mother made a contract for the sale of the land and agreed to convey all her right, title and interest therein. *Held*, that H. had a right to make a lease in his own name, and on his own behalf, and that the plaintiff was entitled thereunder to the use and occupation of the land for the term of the lease. *Ridgley v. DeBough, 100.*

COMMISSION.

4. *Contract—construction.* Under a contract by which an agent agreed to solicit orders for a machine in consideration of the payment of a certain percentage of the amount for which he obtained purchasers for such machine, payable when the orders were received, the principal is not liable for the payment of commissions upon verbal promises, obtained by the agent, to purchase such machine if, upon a demonstration to be made, the same would accomplish what was claimed for it. *Sanderson v. Tinkham Smoke-Consumer Co., 446.*

AGENCY. COMMISSION. *Continued.*

5. *Orders—acceptance by principal—powers of officers of corporation.* The plaintiff having admitted in his testimony that his commissions were payable only when the orders obtained by him were accepted by the principal, which was a corporation, *held*, that a mere mental acceptance of orders by the president of the company would not render the principal liable for commissions upon orders which were of a character that the company was not bound to accept, and which were rejected by its officers when acting together. *Id.*

APPEAL.

NOTICE OF.

1. *Service upon coparties—jurisdiction.* Where a part only of several coparties appeal, the failure of the appellant to serve notice of the appeal upon the other coparties, as provided by section 3174, of the Code, will not affect the jurisdiction of the court to determine such questions as affect only the appellant and the adverse party. *Kellogg v. Colby, 513.*

2. *Notice to coparties.* Where a part only of several coparties appeal, and the interests of the other coparties not appealing will be affected by such appeal, notice of appeal must be served upon such other coparties, or the appeal will be dismissed. *Laprell v. Jarosh, 753.*

3. *Service of—dismissal.* Where the record in a cause upon appeal to the supreme court fails to show service of a notice of appeal as required by law, the case will be dismissed for want of jurisdiction. *State v. Brooks, 754.*

ASSIGNMENT FOR BENEFIT OF CREDITORS.

PREFERENCES.

1. *Attachment—collusion.* An insolvent firm having determined to make a general assignment of its property for the benefit of its creditors, without preferences, employed an attorney to draw up a deed in accordance with that purpose, but before said deed was completed, and before the delivery thereof to the assignee, a creditor, learning of the purpose of the firm, caused an attachment to be levied upon the firm property; thereupon, the said debtors and their assignee, to obtain the release of the attached property, executed a mortgage thereon to the attaching creditor; *held*, that there being no evidence of collusion between said debtors and the attaching creditor in the levy of said attachment, nor of any intention on the part of the debtors to prefer any creditor when they determined to make an assignment, the said deed of assignment and mortgage were not parts of the same transaction, and, therefore, were not to be construed together as a general assignment with preferences. *Rock Island Plow Co. v. Breese & Breese, 553.*

ASSIGNMENT FOR BENEFIT OF CREDITORS. PREFERENCES. *Continued.*

2. *Mortgages—insolvency.* Where an insolvent debtor, at the instance of an attorney for a mercantile agency, executed several mortgages upon his stock of merchandise to as many different creditors, without their knowledge, and upon the same day, for the purpose of securing a *bona fide* indebtedness, and such creditors upon being notified of the debtor's action by telegraph immediately accepted the security, and the attorney thereupon entered into possession of the property on behalf of such mortgagees, *held*, that the mortgages did not constitute a general assignment for the benefit of creditors, and, therefore, void because of preferences. *Butler Bros. v. Didley, 533.*

3. *Mortgages—intention of mortgagor.* The defendant firm, being insolvent, executed to one of its creditors a chattel mortgage upon a part of its property to secure a *bona fide* indebtedness, and on the next day executed four other mortgages to creditors of the firm, without their knowledge, upon a part of the same property, and thereafter the mortgagees under the first mortgage took possession of the property and disposed of the same. At the time the first mortgage was given the mortgagors had no thought of giving the four mortgages subsequently executed. *Held*, that the mortgages, being separate in point of time, and not connected by intention or circumstance, they could not be construed as a general assignment with preferences, and, therefore, void. *Letts, Fletcher & Co. v. McMaster & Dryden, 446.*

POWERS OF ASSIGNEE.

4. *Execution of mortgage on assigned property.* Where an attachment was levied before the completion of the assignment, *held*, that the assignee took the property under said deed subject to said lien, and it was competent for the assignors and assignee, for the purpose of getting the assigned property into the custody of the assignee, to execute a mortgage thereon to the attaching creditor. *Rock Island Plow Co. v. Breese & Breese, 553.*

PROOF OF CLAIMS.

5. *Partnership assets—debt of individual partner.* Where a copartnership made a general assignment of the firm and individual property for the benefit of both partnership and individual creditors, *held*, that a claim against one of the partners which was not filed with the assignee until more than three months after the publication of notice of the assignment, would not be entitled to payment out of the assets of the individual partner in preference to the claims of the partnership creditors of which proof had been duly made, though the assets of such partner were more than sufficient to pay his individual indebtedness. *Budd v. King, 97.*

ATTACHMENT.

THE WRIT.

1. *Amendment—validity of levy.* Where a writ of attachment issued under the seal of the district court, by the clerk of that court, and upon a petition filed in said court, recited that the petition was filed in the circuit court, and directed the sheriff to make return to the circuit court, *held*, that such defects were amendable at any time upon objection being made thereto, and did not affect the validity of the levy. *Rock Island Plow Co. v. Breese & Breese, 553.*

2. *Against partnership property—garnishment of debt due individual partner.* In an action against the firm of S. Bros. the plaintiffs filed an attachment bond payable to said firm, and caused a writ of attachment to issue against the property of the firm alone, under which was garnished a debt due to S. S. & Co., a partnership composed of two of the members of the firm of S. Bros. Subsequently, the plaintiffs amended their petition making the individual members of the firm of S. Bros. parties, and praying a personal judgment against them, but no attachment was issued against their property, and before such amendment was filed the garnishee had, with the consent of S. S. & Co., paid the amount for which he was indebted to one of the creditors of that firm. *Held*, that the writ of attachment authorized the attachment of the property of S. Bros. only, and that the garnishment did not entitle the plaintiffs to money due from the garnishee to S. S. & Co. *Brumwell & Co. v. Stebbins Bros., 425.*

LEVY.

3. *Mortgaged chattels—tender to mortgagee.* A tender to the mortgagee of the amount due under a chattel mortgage, or the deposit of such sum with the clerk of the district court, by an attachment or execution creditor after the levy of his attachment or execution upon the mortgaged chattels, will not make such levy valid. *Blotcky Bros. v. O'Neill, 574.*

ABANDONMENT OF LEVY. See Execution, 6.

USE OF PROPERTY PENDING ATTACHMENT PROCEEDINGS.

4. *Conversion—landlord's attachment.* Where under a landlord's attachment a sheriff levied upon the furniture and effects of the lessees of a hotel building, and, instead of removing said property, took a receipt therefor of one D., who, as agent for the owner of the hotel, kept the same open, and used the attached property for about sixty days, when it was sold under the attachment, *held*, that in the absence of evidence of any damage to the furniture by reason of its use pending the attachment proceedings, and it appearing that its removal from the hotel would have been attended with great expense, and with damage to the property, a judgment against the sheriff and the agent, D., for the conversion of the attached property was erroneous. *Etter v. O'Neil, 655.*

ATTACHMENT. *Continued.*

RELEASE OF ATTACHED PROPERTY.

5. *Writ wrongfully issued—damages—delivery bond.* Where in an action aided by attachment a levy was made upon certain personal property, for the release of which the defendant gave a delivery bond conditioned for the delivery of said property, or its estimated value, to satisfy any judgment that might be rendered against the defendant in said action and upon the trial of said cause the jury found specially that the defendant was entitled to recover upon his counterclaim for damages for the wrongful suing out of said attachment in a sum named, but returned a general verdict in favor of the plaintiff for the amount of his claim less the amount of damages found for the defendant, *held*, that the plaintiff was entitled to have the attached property subjected to the payment of his judgment, and that its release by the court upon the motion of the defendant upon the ground that the attachment had been wrongfully sued out was erroneous. *Cole v. Smith, 579.*

ACTION ON BOND.

6. *Damages—depreciation in value of property.* Under an attachment bond conditioned that the plaintiff will pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment, the plaintiff is liable for any depreciation in the value of the attached property pending the attachment proceeding, even though such depreciation be due to the negligence of the sheriff in not properly caring for the property while in his hands. [GIVEN, J., *dissenting.*] *Blaul & Sons v. Tharp & Co., 665.*

See Garnishment, 1.

ATTORNEY AND CLIENT.

CONTRACTS OF ATTORNEY BINDING ON CLIENT.

*Authority to waive appeal.* Where, in a proceeding for the probate of a will, such instrument was, upon a trial to a jury, declared to be invalid because of the mental incapacity of the testator, and because of the execution thereof under undue influence, and the attorney for the proponent, pending a motion for a new trial, in the belief that said motion would not be sustained, and that no relief could be obtained by an appeal to the supreme court, and after the proponent had told him that she could not raise the money necessary for an appeal, entered into an agreement with the attorneys for the contestants, whereby the motion for a new trial was to be withdrawn, all exceptions and the right of appeal were to be waived by the proponent, and her motion for the allowance of an attorney's fee and costs was to be sustained, *held*, that the agreement was one within the scope of the authority of the attorney to make, and the latter having acted in good faith the judgment entered in pursuance thereof would not be vacated upon the ground that said agreement was made without the consent of

ATTORNEY AND CLIENT. CONTRACTS OF ATTORNEY BINDING ON CLIENT. *Continued.*

the proponent, and that her ignorance of the English language prevented her from properly watching the conduct of her case, and from understanding the suggestions of her attorney. *In re Will of Heath, 215.*

ATTORNEY FEES.

JUDGMENT BY CONFESSION.

*Cannot be taxed.* A judgment by confession is one entered without action, and such a judgment entered upon a promissory note providing for a "reasonable attorney's fee, if sued," will not authorize the taxation of an attorney's fee therein, either under said clause or the provisions of chapter 185 of Acts of the Eighteenth General Assembly. *Dullard v. Phelan, 471.*

BAIL.

DEPOSIT OF MONEY IN LIEU OF. See Criminal Law, 9.

BAILMENTS.

SALE BY BAILEE.

*Title—obtained by purchaser.* In an action of replevin to recover certain diamonds it appeared that the defendant was an innocent purchaser thereof for value from one B., who represented that he was the owner of the same, but who in fact had obtained possession of them from the plaintiff under the representation that he had a customer for the same, and was permitted to take them from the plaintiff's store under promise that he would return with the diamonds or the price in about an hour. *Held*, that the defendant obtained no title by his purchase, and that the plaintiff was entitled to recover. *Baehr v. Clark, 313.*

BANKS AND BANKING.

FUNDS OF ANOTHER DEPOSITED TO PERSONAL ACCOUNT.

*Implied trusts—rights of beneficiary.* The deceased, having obtained the release of a mortgage on real estate given to secure an indebtedness to his mother, sold the real estate, and, with the consent of his mother, retained the amount of the mortgage out of the proceeds of said sale to reinvest for her, she holding the note previously secured by said mortgage. The amount so retained was deposited in bank to the personal account of the deceased, and so remained at the time of his death except a portion thereof that he had invested in certain real estate, taking the title thereto in the name of his mother. *Held*, that the agreement between the deceased and his mother for the retention of said fund constituted the former a trustee for his mother in relation to said fund, and that the mother was entitled to payment of the amount not invested out of the funds in bank to the personal account of the deceased. *In re Estate of Maxwell, 590.*

BILL OF EXCEPTIONS. See Practice and Procedure, 4.

BILLS AND NOTES.

NEGOTIABILITY.

1. *Certainty of payee.* A promissory note payable to a person named therein, "*et al.* or order," is not negotiable either at common law or under section 2085 of the Code. *Gordon v. Anderson, 224.*

INDORSEMENT.

2. *In blank—liability of indorser—instructions to jury.* The court instructed the jury that the law presumed from the defendant's indorsement, that he guaranteed the payment of the note, and that the burden of proof was upon the defendant to show that when he indorsed said note he did not *intend* to guarantee the payment thereof. *Held,* that in view of other instructions given by the court, and the fact that the jury found specially that there was an agreement that the plaintiff should take the note without recourse, the error in the instruction was without prejudice to the plaintiff. *Truman v. Bishop, 697.*

3. *Blank indorsement—parol evidence to explain.* A written contract made pending the consummation of the transaction in question recited, that the defendant S. had "indorsed and deposited" with one D. the note sued upon, and the plaintiff asked the court to instruct the jury that, if they found that the defendant S. signed said agreement, then they should not consider the testimony of said defendant respecting the agreement under which said note was taken by the plaintiff. *Held,* that the indorsement on the note was a part of the contract, and that being in blank, and the character of the indorsement not being defined by the contract, it was competent to show by parol that it was to be without recourse, and, therefore, the instruction was properly refused. *Id.*

CONSTRUCTION.

4. *What law governs—place of payment—usury.* Where a promissory note purported on its face to have been made in Iowa, but the evidence showed that it was in fact made and delivered in the state of New York, where the payee resided, *held,* that in the absence of evidence as to where the indebtedness for which the note was given was incurred, or where the consideration therefor was delivered, or of any agreement as to the place of payment, it must be presumed to be payable in Iowa, and, being valid under the laws of that state, it would not be held void because the rate of interest provided therein is usurious under the laws of the state of New York. *Bigelow v. Burnham, 120.*

DEFENSES.

5. *Alteration by payee—validity.* Where a promissory note was made by filling printed blanks prepared for that purpose, and the blank

BILLS AND NOTES. DEFENSES. *Continued.*

designed for the insertion of the rate of interest was by agreement left without any rate being inserted, and the blank filled by a line or dash, and after delivery of the note the line or dash was erased, and the figure "8" inserted in its stead, *held*, the alteration was sufficient to render the notes invalid. *First Nat. Bank v. Hall, 645.*

BOND.

ACTION UPON. See Injunction, 7.

BOUNDARIES.

PROCEEDINGS TO ESTABLISH.

*Appointment of commission—jurisdiction.* Under the provisions of section 2, of chapter 8, of the Acts of the Fifteenth General Assembly, providing for the appointment of a commission of one or more surveyors to make a survey of and permanently establish corners and boundaries of land in this state, where the same are lost or in dispute, the district court has jurisdiction, upon the application of one owning land within the county, to appoint such commission, where the adjacent tract of land to be affected lies in another county, and the line which it is sought to have changed is the boundary line between the two counties. *Tooman v. Hidlebaugh, 130.*

CHATTEL MORTGAGES. See Mortgages of Personal Property.

COMMISSIONS.

ON SALES OF PROPERTY. See Agency, 4, 5; Equity, 4, 5.

COMMON CARRIERS. See Contracts, 15; Railroads.

CONFLICT OF LAWS. See Bills and Notes, 4.

CONSTITUTIONAL LAW.

JUDICIAL POWERS.

1. *Executive council—designation of penitentiary.* Section 1, chapter 43, of the Acts of the Fourteenth General Assembly, and section 8, chapter 40, of the Acts of the Sixteenth General Assembly, establishing a penitentiary at Anamosa, and providing that such convicts shall be confined therein as may be designated by the executive council of the state, are not in conflict with section 1 of article 5 of the constitution of this state, vesting the judicial power of the state in a supreme and district courts. *O'Brien v. Barr*, 51.

2. *Executive council—designation of penitentiary.* Under the above statutes the executive council may order the removal from the penitentiary at Ft. Madison to that at Anamosa of all convicts of a class described, without naming the particular convicts so to be transferred, but leaving the selection of those falling within such class to be made by the warden. *Id.*

CONSTITUTIONAL LAW. *Continued.*

EXCESSIVE FINES.

3. *Intoxicating liquors—injunction—violation.* Section 1543 of the Code, as amended by section 12 of chapter 143 of the Acts of Twentieth General Assembly, providing for a fine of five hundred dollars, and imprisonment, for the violation of an injunction against the sale of intoxicating liquors is not unconstitutional. *Utterson v. Conrad, 746.*

CONTRACTS.

CONSIDERATION.

1. *Agreement for future support.* At the time of a conveyance of real estate by a widow, she was sixty-five years of age, and the same was made in consideration of an agreement for support and maintenance during her life, including board, clothing and all other things necessary for her comfort and happiness, which was secured by bond. It was then uncertain how long the widow would live, and the daughter was the only one of her children residing near her. *Held,* that the consideration was sufficient. *Pellizzarro v. Reppert, 497.*

CONSTRUCTION.

2. *Agency—commissions.* Under a contract by which an agent agreed to solicit orders for a machine in consideration of the payment of a certain percentage of the amount for which he obtained purchasers for such machine, payable when the orders were received, the principal is not liable for the payment of commissions upon verbal promises, obtained by the agent, to purchase such machines, if, upon a demonstration to be made, the same would accomplish what was claimed for it. *Sanderson v. Tinkham Smoke-Consumer Co., 446.*

3. *Compromise—consideration.* A rule of a fair association permitted the officers, in case of unfavorable weather, to reduce or scale down the premiums, and the court had instructed the jury that if the conditions were such that the officers might scale down the premiums the association would only be liable for the reduced amount. There was evidence of an offer on the part of the association to pay less than the full amount of the premiums, and of the acceptance by some of such offer. *Held,* that the court properly instructed the jury that no agreement of the exhibitors to accept a less sum than what was due, without other consideration than the payment of such less sum, would be binding. *Murray v. Walker, 202.*

4. *Fire insurance policy—conditions—change of ownership—chattel mortgage.* A stipulation in a fire insurance policy upon personal property, that the policy should become void in the event of any change in the title, ownership or possession of the property insured, is not violated by the execution of a mortgage upon such property to one who had an insurable interest in the property at the time the policy was issued. *Taylor v. Merchants & Bankers' Ins. Co., 402.*

CONTRACTS. CONSTRUCTION. *Continued.*

5. *Unforeseen circumstances.* One of the specifications in a contract for building a sewer being that whatever precaution unforeseen circumstances may render necessary, in the judgment of the engineer, in order to make the sewer both unyielding and impervious, shall be taken; and that all extra work or materials rendered necessary thereby, which may be ordered by the engineer, should be paid for on his estimate; *held*, that the specification had no reference to the excavation. *McCauley v. City of Des Moines, 212.*

6. *Patent ambiguity—evidence.* An agreement for the purchase of cattle, then being fed by the vendor, dated September 26, 1888, and providing for the delivery of "two loads now, two loads in two weeks, one hundred head in October next, and the remainder by the twenty-fifth of November," presents no ambiguity as to the time when the last of the cattle were to be delivered. *Ingram v. Wackernagel, 82.*

7. *Place of performance—breach—damages.* The market price in M. where said cattle were kept, being controlled by the market price in C., and it not appearing that a better price could have been obtained in M., *held*, that the vendor had a right to ship the cattle to C., and that if he did so in good faith, and sold them for the best market price he could procure, he was entitled to recover of the vendee the difference between the contract price and the price received, with interest, deducting the necessary expenses for shipping; and that evidence was admissible as to prices in C. from November 26, to the date of sale. *Id.*

8. *Guarantee as to payment of purchase price.* By a contract between the plaintiff and the defendant and a certain construction company, the plaintiff undertook to furnish the construction company with certain materials in installments, and at prices named, which the construction company agreed to pay for weekly to the extent of ninety *per cent.* of the value of the materials received and to make monthly payments in full for all materials received in the month preceding; such payments to be made upon drafts drawn at three days' sight by the plaintiff. The faithful performance of all the obligations of this contract by the construction company was guaranteed by the defendant, and to such end agreed to deposit as security for the full performance of said obligations the sum of ten thousand dollars with a bank named, the same to be applied to the payment of any sum which the said construction company might fail to pay in the manner set forth in said contract. *Held*, that the guaranty of the defendant was not special, as applying only to dishonored or repudiated drafts drawn upon the construction company, but was general, and that the defendant was liable to the plaintiff thereon for the amount of the unpaid balance due from the construction company for materials furnished under said contract, whether drafts had been drawn therefor

upon the construction company or not. *Shickle, Harrison & Howard Iron Co. v. Council Bluffs Waterworks Co.*, 396.

See Bills and Notes, 4.

PERFORMANCE.

9. *By party seeking damages—date falling on Sunday.* A contract for the purchase of cattle provided that the cattle should be yarded at the vendor's shrink lot for twelve hours at night before shipment. The date provided for the last shipment fell on Sunday, and on that account the cattle were not put into the shrink lot until the night of the twenty-sixth. *Held*, that the vendor sufficiently complied with the contract. *Ingram v. Wackernagel*, 82.

10. *Sales of personal property—breach—remedy of vendor.* On the evening of November 26 the vendor telegraphed the vendee that he would hold the cattle until the next day subject to his order, and that if the same were not then received by the vendee he would take steps authorized by law to protect himself. *Held*, that, conceding such a notice was necessary, the vendor was not obliged to state what action he would take to indemnify himself against loss. *Id.*

11. *Sales—future delivery—agreement as to quality—evidence.* A contract for the sale and future delivery of granite blocks for paving the streets of a city contained certain specifications, designating the quality and dimensions of the blocks to be used by the paving contractor, and providing that in no case would the contractor be allowed to use blocks other than those described in the specifications, or which should be approved by the city engineer. Some of the blocks shipped by the plaintiff to the defendants under said contract having been objected to by the city officials, the defendants refused to receive any of the blocks shipped. *Held*, in an action by the vendor against the vendee for the breach of said contract, that the plaintiff was properly permitted to show that the blocks furnished by him were as good as those laid by the defendants, and accepted by the city. *Loftus v. Riley & Co.*, 503.

12. *Sale—refusal of vendee to accept—remedy of vendor—tender.* The defendants having, by their contract, placed it out of their power to accept the blocks contracted for, *held*, that the plaintiff was justified in relying upon their action as a waiver of a tender of the balance of the contract number of blocks not shipped, and was entitled to recover damages for that portion of which no tender of the actual material was made. *Id.*

13. *Substantial performance only required.* The court instructed the jury that the defendants were liable for the carloads of blocks not inspected by them, unless they did not conform substantially to the specifications. *Held*, that the use of the word *substantially* in such connection was not erroneous. *Id.*

CONTRACTS. *Continued.*

ALTERATION OF.

14. *Landlord and tenant—alteration of lease by lessee.* Where a lease of lands is made to commence at a future date by one already in possession thereof, the subsequent alteration by the lessee of certain dates in said lease, referring to the time when the lease was made, will not affect the lessee's right to the possession of said premises. *Lee v. Lee, 565.*

VALIDITY.

15. *Telegraph companies—contracts limiting liability—damages.* The failure of a telegraph company to send a night message delivered to it under an agreement that the sender would not claim damages for errors or delays, or for non-delivery of such message, happening from any cause, beyond a sum equal to ten times the sum paid for transmission, will, notwithstanding such agreement, render the telegraph company liable for the actual damages sustained. *Garrett v. W. U. Tel. Co., 257.*

16. *Restraint of trade—consideration.* The grocerymen of a town entered into an agreement with the plaintiffs not to buy any butter nor to take any in trade, except for the use of their families; providing that such agreement should not prevent any merchant from buying butter to retail from any regular butter buyer who bought all the butter he handled in the town for cash. The contract recited as occasion for its execution that the grocerymen found the business of purchasing butter of the farmers, and handling the same, very burdensome, and they believed the same could be better handled as an exclusive business. The plaintiffs in said agreement undertook to open rooms conveniently located for buying butter, to keep a man in attendance thereat, to accept all butter offered, and to pay as high a price therefor in cash, as the merchants or butter buyers in the town of N., in the same county, were at the time paying. The contract was to continue for two years unless sooner dissolved, and it might be terminated at any time whenever the majority of the grocerymen were dissatisfied with the agreement or with the manner in which it was carried out. This action having been brought to enjoin one of the grocerymen from engaging in the business of buying and selling butter in said town, *held*, that said contract was without consideration, and was, therefore, invalid. *Chapin v. Brown Bros., 156.*

17. *Restraint of trade.* Such contract is also invalid as being in restraint of trade, and, therefore, against public policy. *Id.*

See Bills and Notes, 4.

INJUNCTION TO PREVENT BREACH.

18. *Irreparable injury.* The defendant, by a resolution of its board of directors, agreed that gas for all ordinary purposes, including gaslog in the library, thereafter used in the then residence of plaintiff,

CONTRACTS. INJUNCTION TO PREVENT BREACH. *Continued.*

and including two street lamps in front of said residence in a street named in the city of Dubuque, should be free of cost for a period not exceeding twenty years. *Held*, that said contract was not void for uncertainty; and that upon the petition of the plaintiff alleging that the defendant threatened to disconnect the gas pipes, so as to wholly cut off the supply of gas to which the plaintiff was entitled under said contract, a temporary injunction should have issued restraining the defendant from said action, notwithstanding the financial responsibility of said defendant for the payment of any damages sustained by the plaintiff. *Graves v. Key City Gas Co., 714.*

19. *Previous breach by plaintiff.* Conceding that the plaintiff was using an excessive quantity of gas in violation of said contract, and that the defendant might be entitled to relief against the plaintiff on that account, *held*, that such fact would not excuse the threatened action of the defendant, nor constitute sufficient ground for the denial of an injunction. *Id.*

RESCISSION.

20. *Contracts made on Sunday.* A party is not entitled to the rescission of a contract of exchange of personal property upon the ground that it was made on Sunday, where it appears that no advantage has been taken by either party, and neither has suffered loss by the transaction. *Kelley v. Cosgrove, 229.*

21. *Refusal to perform—subsequent tender.* The defendants were employed by the plaintiff to sell for him a lot for two hundred and seventy-five dollars, one-third of which was to be paid in cash and a note to be given for the balance payable in one year with interest at eight per cent. They afterwards notified the plaintiff that they had found a purchaser, and that the cash payment and note were ready to be delivered to him. Thereupon the plaintiff executed a title bond, with the place for the grantee left blank, and upon the delivery of the same to the defendants they offered him, instead of the money and note as aforesaid, five or ten dollars for an option on the purchase of the lot. The plaintiff then demanded the return of the bond or a compliance with the contract, but the defendants refused to do either, but filled up the bond with the name of one G., who assigned it to S. *Held*, that the rights of the parties were fixed when the defendants refused to pay the money and deliver the note in accordance with the contract, and were not affected by a subsequent tender by the defendants, and that the plaintiff was entitled to a cancellation of the bond. *Patton v. Cook & Morgan, 71.*

22. *Corporations—subscription to stock—fraud—laches—relief.* The defendants were induced, through the misrepresentations of the general agent of the plaintiff company, to purchase certain shares of its stock. Soon after the defendants acquired knowledge of the fraudulent character of the representations made to them, the com-

CONTRACTS. RESCISSION. *Continued.*

pany decided to reinsure its risks, and retire from business, and the defendants allowed the settlement of the company's business to proceed for nearly four years with the knowledge that they appeared to be stockholders, and that a note and mortgage given in consideration of their stock were apparently valid obligations. They expressed dissatisfaction with the manner in which they had been treated, and a desire to get rid of their stock, and secure the return of said note and mortgage, but at no time made an unequivocal attempt to rescind their contract of membership in the company. *Held*, in an action brought by the company upon said note and mortgage, that conceding that the representations made to the defendants would have entitled them to a rescission of their contract of purchase had they acted with diligence, they were not now entitled to such relief. *Cedar Rapids Ins. Co. v. Butler, 124.*

23. *Pleading—practice in supreme court.* The defense of laches was not interposed to the defendants' claim for a rescission of their contract by reply to the defendants' answer, but no objection having been raised to its consideration in the district court, *held*, that it could not be raised for the first time in the supreme court. *Id.*

EVIDENCE.

24. *Parol testimony to vary.* The plaintiff undertook by a contract in writing to construct a brick sewer for the defendant according to written plans and specifications at a certain price per lineal foot. By the terms of the contract he agreed to make all necessary excavations, and furnish, at his own expense, all necessary materials and labor. In making the excavation the plaintiff found it necessary to remove a large quantity of rock in order to put the sewer in place, which involved an expenditure of several hundred dollars more than would have been incurred if the excavation had been composed wholly of earth. *Held*, that parol evidence was inadmissible to show that when the contract was made the parties thereto supposed that the excavation would be of earth alone. *McCauley v. City of Des Moines, 212.*

25. *Parol testimony to vary.* Where a lease for a hotel provided that the lessee should make all improvements he might deem necessary in the house at his own expense, but that all outside and permanent improvements were to be done at the expense of the lessor, and the cost thereof deducted from the rent, *held*, that the lessee was not entitled under such provision to reimburse himself for the cost of placing a heating furnace in the house, and that evidence of a verbal agreement of the lessor to allow the lessee for the cost of the same was inadmissible. *Smith v. Hess, 238.*

26. *Parol testimony to vary.* A written contract made, pending the consummation of the transaction in question, recited that the defendant S. had "indorsed and deposited" with one D. the note sued upon, and the plaintiff asked the court to instruct the jury that if they found

CONTRACTS. EVIDENCE. *Continued.*

that the defendant S. signed said agreement then they should not consider the testimony of said defendant respecting the agreement under which said note was taken by the plaintiff. *Held*, that the indorsement on the note was a part of the contract, and that being in blank, and the character of the indorsement not being defined by the contract, it was competent to show by parol that it was to be without recourse, and, therefore, the instruction was properly refused. *Truman v. Bishop, 697.*

27. *Breach of by vendee—damages.* The contract between the plaintiff and defendants was made in the month of April, and was for blocks for seventeen hundred and fifty yards of paving, but contained no provision fixing time for delivery. The contract for paving between the defendants and the city, however, provided for thirty-five hundred yards of granite paving, besides a quantity of brick paving, and that work thereon should commence on or before April 15, and be completed on or before August 15. No demand was made for the blocks to be furnished by the plaintiff until the eighth of May, when the defendants telegraphed the plaintiff that they must ship the balance of blocks, being for twelve hundred and fifty yards of paving, within three days. Afterwards the defendants examined two of the ten carloads of blocks shipped by the plaintiff, and, finding some of them defective in quality and size, refused to receive them, without giving the plaintiff notice of their defective character or giving him an opportunity to furnish blocks that would conform to the contract. *Held*, that the evidence warranted a recovery by the plaintiff in damages for the breach of the contract. *Loftus v. Riley & Co., 503.*

28. *To show contract made on Sunday.* The lease in question purporting on its face to have been made on Monday, and no issue being raised as to the day on which the same was entered into, *held* that the court properly excluded evidence to show that it was made on Sunday. *Lee v. Lee, 565.*

CONTRIBUTORY NEGLIGENCE. See Negligence.

CONVEYANCES.

CONSIDERATION.

1. *Agreement for future support.* At the time of the conveyance of certain real estate by a widow to her daughter she was sixty-five years of age, and the same was made in consideration of an agreement for support and maintenance during her life, including board, clothing and all other things necessary for her comfort and happiness, which was secured by bond. It was then uncertain how long the widow would live, and the daughter was the only one of her children residing near her. *Held*, that the consideration was sufficient. *Pellizzarro v. Reppert, 497.*

CONVEYANCES. CONSIDERATION. *Continued.*

2. *Mortgage—fraud.* Where C., having land mortgaged to S., employed a loan agent to negotiate for him another mortgage upon the same land with which to pay off the former mortgage indebtedness, and said loan agent took from C. his note and mortgage for the required sum payable to the order of K., and promised to pay the money received thereon to the satisfaction of the mortgage to S., and the note and mortgage given by C. were accepted by K. under the belief that certain moneys collected by the loan agent for him had been paid to C., but the money was not so paid, nor was it applied upon the mortgage to S., and had in fact been converted by said agent to his own use before the execution of C.'s note and mortgage to K., *held*, that the note and mortgage to K. were void for want of consideration. *Security Co. v. Kent, 30.*

DELIVERY.

3. *As between relatives—evidence.* Where an insolvent debtor, about ten months before his death, executed two deeds, the one to his wife and the other to his son, conveying to each an undivided one-half interest in certain lands, but up to within a short time before his death continued to exercise acts of ownership over such land, and such ownership was admitted by said grantees, and after the death of said grantor the deeds were found in his dwelling-house in a box where his private papers had been kept for many years, but such box had no lock and key, and the son had access thereto as a place of deposit for his private papers, and a few days after his father's death the son took the deeds from the box, and filed them for record, *held*, that the evidence did not show a delivery of the deeds, and that a conveyance by the son of his interest in said land, made after his father's death, was void as against the creditors of the father's estate. *Reichart v. Wilhelm, 510.*

4. *Cancellation—fraud.* The plaintiff, being the owner of a house and lot worth one thousand dollars, and occupied by him as a homestead, entered into a written agreement with the defendant to trade the same for eighty acres of land, which the defendant said he had not seen, but represented that it was worth twenty-five hundred dollars, and adapted to farming and suitable for a home. Under the agreement the plaintiff was to see the land before closing the deal, and if the trade was made he was to assume an incumbrance of one thousand and fifty dollars against the land. Subsequently the parties went to the office of the defendant's lawyers, executed deeds to their respective properties, the written agreement was destroyed, the recording fees for the two deeds were paid to the attorney, and thereupon the plaintiff left the office to go to see the defendant's land. The evidence of the respective parties as to whether a delivery of the deeds was assented to at this time was conflicting, but the attorney understood that the deeds were to be recorded, and sent them to the proper office for that purpose. The evidence showed that the

CONVEYANCES. DELIVERY. *Continued.*

plaintiff was inexperienced in business, ignorant and confiding, while the defendant was capable and awake to his own interest. The land being found worth not over five hundred dollars, the defendant asks that his deed be canceled. *Held*, that the evidence did not show that the plaintiff had assented to a delivery of his deed, and as the defendant would gain an unconscionable advantage over the plaintiff by the trade if enforced, the latter was entitled to the relief asked. *Berkshire v. Peterson, 197.*

CONSTRUCTION OF.

5. *Aid of plat.* Where a deed conveyed lots, numbered 1, 2, 3 and 4, in a block named, which were all of the lots included in said block, and subsequently by a new plat of said lots and other property a lot numbered 5, and a strip of land fifty feet wide without number, was added to the block in which the lots aforesaid were located, *held*, that the grantees under said deed acquired no interest in the strip of land added to said block, and not designated by any lot number. *Young v. Cosgrove, 682.*

6. *Validity of plat.* The invalidity of a plat filed of record as to certain real estate will not affect the title to real estate conveyed with reference to the subdivisions designated therein, nor to its use for the purpose of ascertaining the property intended to be conveyed. *Id.*

7. *Easements.* Where upon the same day with a conveyance of certain real estate the grantor granted to the grantee, "his heirs and assigns" and "tenants and occupiers" the right to pass over a certain strip of land adjoining the premises conveyed "from time to time, and at all times forever hereafter," *held*, that the right of way was appurtenant to the premises conveyed, and passed with a subsequent conveyance of said premises which described said property by metes and bounds, and contained no reference to said right of way. *Moll v. McCauley, 677.*

See Sales, 4.

COSTS.

RECOVERY.

1. *Unnecessarily incurred.* The cost of publication of the notice of an execution sale having been incurred for various pieces of land, and it not appearing what part of such expense was on account of the lands in controversy, and said sale as to the latter lands being unnecessary, *held*, that the plaintiff was not entitled to recover such costs. *Bullard v. Harkness*, 373.

APPORTIONMENT OF.

2. *Defendant unsuccessful on counterclaim.* The defendant admitted the plaintiff's claim, and the amount of the latter's recovery was

COSTS. APPORTIONMENT OF. *Continued.*

reduced somewhat by the defendant's counterclaim, but nearly the whole cost of the trial resulted from one counterclaim of the defendant in which he was unsuccessful. *Held*, that facts did not warrant an apportionment of the costs. *Smith v. Hess*, 238.

COURTS.

JURISDICTION OF.

1. *Attachment—garnishment of non-resident debtor—garnishee sued in another state—abatement.* A., a corporation organized under the laws of Pennsylvania, and doing business under a license in the state of Illinois, and also in this state, being indebted to D., a corporation organized under the laws of this state, the latter assigned its claim against A. to G., a resident of this state, and gave notice thereof to A. Afterwards the firm of G. & W., creditors of D., commenced an action against D., aided by attachment, in the state of Illinois, and garnished A. The latter answered as to the assignment to G., and thereupon G., being served with notice to interplead, appeared and answered in the case in Illinois, submitting itself and its interests in the debt garnished to the jurisdiction of that court. Subsequently, and while the action in Illinois was still pending, G. commenced an action upon the assigned claim against A. in this state. *Held*, upon demurrer to an answer by A. therein, in the nature of a plea in abatement, that the laws of Illinois being presumed to be the same as those of this state, in the absence of a showing to the contrary, A. was liable to suit upon the claim of D. in the courts of Illinois, in all respects as a resident corporation of that state would be, and likewise to garnishment therefor, and, therefore, the Illinois court, by its process of garnishment, and the appearance of G. therein, had acquired jurisdiction of the claim in controversy. *German Bank v. American Fire Ins. Co.*, 491.

2. *Process—extra territorial service—voluntary appearance—waiver of jurisdiction.* The Illinois court being without jurisdiction to require G. to interplead in the garnishment proceeding, its appearance in response to the process of that court is to be regarded as voluntary, and a waiver of its right to object to the jurisdiction of the court. *Id.*

CRIMINAL LAW.

INDICTMENT.

1. *Certificate of evidence on preliminary examination.* Where the stenographic notes of the evidence of witnesses upon the preliminary examination in a criminal cause, taken by one not under oath, were transcribed by the stenographer in type-writing, and such copy was certified to by the justice, and returned to the clerk of the district court as the minutes of testimony taken before him on such examination, *held*, that such certified transcript was sufficiently authenticated

to authorize the grand jury to act upon it, and to indorse the names of the witnesses given therein upon the indictment. *State v. Wise*, 596.

2. *Adultery—construction of statute.* In a prosecution for adultery committed by an unmarried man with a married woman, it is competent to prove that the prosecution was commenced upon the complaint of the husband of such woman, though there be no allegation of that fact in the indictment. The provision of section 4008 of the Code that such prosecution can be commenced only on the complaint of the husband or wife is not an element of the crime of adultery. *State v. Maas*, 469.

3. *Liquor nuisance—sufficiency of charge—second conviction.* Where an indictment for the crime of nuisance, as defined in section 1543 of the Code, further charged that the defendant "was, on the twenty-sixth day of September, 1888, convicted of the crime of nuisance, in the district court of Marshall county, Iowa, *held*, that the indictment sufficiently alleged a former conviction of the same kind of nuisance as that for which he was then indicted; and that, by his plea of guilty, the defendant not only confessed himself as guilty of keeping a nuisance, as charged, but that he had formerly been convicted of keeping the same kind of nuisance, and warranted his commitment to the county jail, as provided by section 9, chapter 66, of the Acts of the Twenty-first General Assembly. *State v. Zimmerman*, 118.

4. *Arson—duplicity.* Where an indictment charged that the defendant caused to be set fire to and burned a large amount of combustible material, with the intention to cause a certain described store building to be burned, and did then and there in the manner and at the time and place aforesaid set fire to, and cause to be burned, in the night time, the said store building, *held*, that the charge as to the actual burning must be regarded as an allegation of evidence to be treated as surplusage, and that the indictment was not, therefore, bad for duplicity. *State v. Hull, 112.*

ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER.

5. *Evidence.* The defendant, while assisting a husband in the forcible abduction of his wife from the house of her parents, where she was residing, became engaged in a conflict with the wife's father, and in the course thereof a revolver held by the defendant in his hand was discharged, inflicting a wound in the father's knee. The defendant claimed that the revolver was discharged by accident. *Held*, that evidence was sufficient to support a verdict of an assault with intent to commit manslaughter. *State v. Postal, 460.*

PERJURY.

6. *Evidence—competency—error without prejudice.* The defendant was indicted for the crime of perjury alleged to have been com-

CRIMINAL LAW. PERJURY. *Continued.*

mitted by him in a case wherein he was on trial for the crime of receiving a bribe. In his capacity of constable the defendant had seized certain intoxicating liquors, and it was claimed that he and another constable acting with him agreed with the owner to obtain the release of the liquors in consideration of the payment of one hundred dollars. The liquors were released upon the recommendation of one or the other of the officers, and the money, it was alleged, was paid to the constable acting with the defendant in bills of the denominations of fifty, twenty and ten dollars. Before the payment of the money the bills were marked by the owner of the liquors, and a memorandum describing the bills, and the marks upon them, was made. Within a few hours after the payment both officers were arrested and searched, and a fifty-dollar bill found upon the defendant, and bills of the other denominations were found upon the other constable. A memorandum of the bills so found was made by the justice before whom the constables were searched, and that justice and another together made a second memorandum. The witnesses who made the above memoranda testified positively to the correspondence of the same with the money found upon the defendant, and this the defendant, testifying in his own behalf, did not deny, but claimed that the bill found upon him had been received from a bank some days prior to his arrest. *Held,* that while the memoranda were not competent as original evidence, their introduction could not have been prejudicial to the defendant. *State v. Potts, 317.*

ROBBERY.

7. *Force necessary—instructions.* The defendant was indicted for the crime of robbery by means of putting in fear one G., and taking with force and violence, while armed with a dangerous and deadly weapon, a jug containing whiskey from the person of said G. The evidence tended to show that, while the defendant and G. were riding together in a hack, with a jug of whiskey belonging to G. resting on the floor of the hack near them, not secured in any manner, and while G.'s attention was diverted, and without any resistance from him, the defendant seized the jug, leaped with it from the hack, and ran back towards the town from whence the hack had come. He was followed by G., and was overtaken after running a short distance, and after he had thrown the jug over a fence. The evidence was conflicting as to what then took place, G. claiming that the defendant, with knife in hand, compelled him to surrender the jug by threats of great bodily injury, and then carried it away; while the defendant claimed that while the jug rested on the fence in the hands of G. the latter turned to look to see some one who had called, and released his hold, and at that moment defendant took the jug and carried it away. The court refused to instruct the jury, at the request of the defendant, that "if, at the time the defendant took the jug, the said Graham was looking out of the hack at some other object, and did

not have hold of it, and it was setting on the bottom of the hack, not attached to his person, and no other force or violence was used by the defendant than merely to take hold of the jug and carry it away without the knowledge of said Graham," this would not constitute the crime of robbery. *Held*, that the instruction should have been given. *State v. Miller, 291.*

8. *Acts which are parts of same transaction.* The acts of the defendant at the hack and at the fence being so closely connected as to partake of the nature of a single transaction, *held*, that it was proper for the jury to consider the two transactions together in determining whether the defendant was guilty as charged. *Id.*

BAIL.

9. *Deposit of money in lieu of bail—payment to sheriff.* An agreement by a sheriff to accept a sum of money in lieu of bail from a prisoner in his custody, and deposit the same with the clerk of the district court, is invalid, and no right of action can accrue thereon to either the state or county for the recovery of said money. *State v. Farrell, 661.*

SENTENCE.

10. *Grounds for reduction.* The youth and previous good character of a defendant in such case will not be deemed sufficient ground for reducing a sentence of six months in the penitentiary. *State v. Postal, 460.*

CUSTOM.

EFFECT ON CONTRACTS.

1. *Knowledge must be shown.* Where in an action by a broker for commission for the sale of real estate, mortgaged for nearly its full value, which mortgage the purchaser assumed, and conveyed to the grantor other real estate for the equity in the premises, the evidence was uniform as to the customary charges of agents for the sale of real estate, but was conflicting as to what sum should be the basis upon which to compute the commission, *held*, that under the circumstances the court properly instructed the jury that if they found a custom existed as to charges for such services it must be shown that the principal had knowledge of its existence. *Smith v. Hess, 238.*

RELIANCE ON.

2. *Negligence—justification.* One who turns his back to a moving train, while standing on a railway track, merely to satisfy his curiosity, will not be justified in relying upon a custom as to the movement of trains, which, if observed, would have rendered his action safe. *Collins v. Burlington, C. R. & N. Ry. Co., 346.*

DAMAGES.

CONTRACTS LIMITING LIABILITY.

1. *Telegraph companies—negligence.* The failure of a telegraph company to send a night message delivered to it under an agreement that the sender would not claim damages for errors or delays, or for non-delivery of such message, happening from any cause, beyond a sum equal to ten times the sum paid for transmission, will, notwithstanding such agreement, render the telegraph company liable for the actual damages sustained. *Garrett v. W. U. Tel. Co., 257.*

PROFITS.

2. *Proximate cause.* If the plaintiff in making purchases at Kansas City acted upon the absence of any reply to a certain telegram, *held*, that the damages resulting from such purchase, through ignorance of the decline in prices at Chicago, were direct and not speculative. *Id.*

DOUBLE DAMAGES.

3. *Railroads—injury to stock—tender.* In an action for double damages for injuries to stock caused by the defendant, the latter admitted the killing of the stock, the amount of actual damages sustained to be as alleged in the petition, and that notice thereof had been duly served as provided by statute, but in excuse for its failure to make payment thereof pleaded that, before the expiration of the thirty days allowed by statute after receipt of said notice, the defendant was at the residence of the plaintiff, ready to pay him the full value of the stock injured, but the plaintiff was absent from home, and that the defendant was still ready to pay the amount of the actual damages sustained. *Held*, that a demurrer to the defendant's plea was properly sustained. *Hammans v. Chicago, R. I. & P. Ry. Co., 287.*

EXEMPLARY.

4. *Slander—malice—exemplary damages.* In an action for slander proof that actionable words were spoken is sufficient evidence of malice to warrant an instruction to the jury that if they found that the slander in question was uttered by the defendant with actual malice they should allow the plaintiff exemplary damages. *Blocker v. Schoff, 265.*

EXCESSIVE.

5. *Injury caused by trespass.* In an action to recover damages for an alleged trespass upon certain lands the jury found that the defendant had without authority taken possession of one-twelfth of an acre of the plaintiff's land, of the value of fifty dollars per acre, that no damage had been done to the land itself, and that the plaintiff was not entitled to recover anything for restoring the soil, but allowed the plaintiff the sum of fifty dollars as the rental value of the land occupied by the defendant for four and one-half years. *Held*, that the verdict was excessive. *Henderson v. Chicago, R. I. & P. Ry. Co, 221.*

DAMAGES. *Continued.*

MITIGATION OF.

6. *Slander—good faith.* The belief that a slander is true, and the good faith of the person uttering the same, may be shown in mitigation of damages, but will not prevent the recovery of substantial damages for the injury sustained. *Blocker v. Schoff, 265.*

INJURY COMMON WITH THAT OF PUBLIC.

7. *Instruction—construed.* An instruction, in an action for damages on account of the laying of a railroad track in front of premises, that the abutting property-owner is not entitled to recover damages which his tenants may have sustained, or will sustain, by reason of any annoyance, inconvenience or loss suffered by them in common with the rest of the public, by reason of the construction and operation of railroad track in front of his premises, *held,* proper, the jury being also instructed that depreciation in the value of the plaintiff's property on such account would entitle him to recover. *Cook v. Chicago, M. & St. Ry. Co., 278.*

MEASURE OF.

8. *To property abutting on railroad.* The measure of damages in such case is the difference between the fair market value of the property immediately before laying the track and the like value immediately thereafter, irrespective of the benefit that may have resulted to the property from the laying down of such track. *Id.*

9. *Destruction of growing trees.* A fire set by defendant's engine having destroyed two acres of native maple and box-elder growing trees, which it was the plaintiff's intention to use from time to time for wood and other timber, *held,* that the plaintiff was entitled to recover the difference in the value of the timber just before and its value just after the fire. *Greenfield v. Chicago & N. W. Ry. Co., 270.*

10. *Attachment—wrongful levy.* Under an attachment bond conditioned that the plaintiff will pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment, the plaintiff is liable for any depreciation in the value of the attached property pending the attachment proceeding, even though such depreciation be due to the negligence of the sheriff in not properly caring for the property while in his hands. [GIVEN, J., *dissenting.*] *Blaul & Sons v. Tharp & Co., 665.*

11. *Failure to send telegram.* The market price in M. where certain cattle had been sold being controlled by the market price in C., and it not appearing that a better price could have been obtained in M., *held,* that the vendor had a right to ship the cattle to C., and that if he did so in good faith, and sold them for the best market price he could procure, he was entitled to recover of the vendee the difference between the contract price and the price received, with interest, after

DAMAGES. MEASURE OF. *Continued.*

deducting the necessary expenses for shipping; and that evidence was admissible as to prices in C. from November 26 to the date of sale. *Ingram v. Wackernagel, 82.*

12. *Breach of warranty—joint liability of husband and wife.* Where before the enactment of section 1937 of the Code a husband and wife joined in a conveyance of lands containing a general covenant of warranty, *held*, that, although the land was the property of the wife, the husband was liable thereon, and that the measure of damages was the amount of consideration paid, whether as principal or interest, together with interest thereon at six *per cent. per annum* from the dates of payment. *Bellows v. Litchfield, 36.*

13. *Personal injury—compensatory damages—evidence—instructions.* The jury were instructed that, in their determination of the amount of compensatory damages to be recovered by the plaintiff, they should allow such damages as would "fairly compensate" the plaintiff "for what he paid out or incurred for medical attendance." *Held*, that the instruction being in the alternative as to the allowance of such expenses either paid or incurred, the instruction was not erroneous, though the evidence failed to show the actual payment of any sum; and that the jury must have understood from such instruction that only reasonable and necessary expenditures were to be allowed. *Flanagan v. Baltimore & O. Ry. Co., 639.*

14. *Injunction—bond—expenses.* In an action brought by the defendant to enjoin an execution sale of certain lands and to quiet his title thereto, the injunction was, upon final hearing, dissolved, and the defendant held to hold the land in trust for the plaintiff herein. *Held*, in an action upon the injunction bond that the plaintiff was not entitled to recover as damages the costs and expenses incurred in obtaining the dissolution of said injunction. *Bullard v. Harkness, 373.*

15. *Use of land.* The value of the use of the land in such case for the time that the plaintiff was kept out of possession being contingent upon the result of said execution sale, *held* not to be recoverable as damages. *Id.*

16. *Cost of publishing notice of sale.* The cost of publication of the notice of said execution sale having been incurred in part for other lands, and it not appearing what part of such expense was on account of the lands in controversy, and said sale as to the latter lands being unnecessary, *held* that the plaintiff was not entitled to recover such costs. *Id.*

IN CASES OF CONTRACT.

17. *Injury within contemplation of parties.* A cattle buyer on his way to Kansas City, Missouri, delivered to the defendant at Columbus Junction, Iowa, to be sent to his agents at Chicago, the following

message: "Send me market Kansas City, to-morrow and next day." It appeared that, under the arrangement between the plaintiff and the agents to whom said message was addressed, the said agents were not to answer if there was no change in the market since their last report, but if there was a change they were to answer by giving him the advance or decline. The plaintiff, receiving no answer to his telegram at Kansas City, bought a large number of cattle in the belief that there was no change in the market at Chicago, when in fact there was a decline in prices. *Held*, that it should have been left to the jury to determine whether, under all the facts and circumstances of the case, the damages sustained by the plaintiff were such as the plaintiff might reasonably have apprehended would result from a failure to send the plaintiff's message. *Garrett v. W. U. Tel. Co.*, 257.

WHEN AVOIDABLE.

18. *Acts necessary.* It appeared that the Chicago market for cattle was posted on the bulletin boards of the stock exchange at Kansas City, and that if the plaintiff had consulted these he would have been advised of the decline in the market before he made his purchase. *Held*, that it was for the jury to determine, whether the plaintiff, as a reasonably prudent man, ought not to have relied upon his message to his agents at Chicago under the arrangement above referred to. *Id.*

AWARD OF IN CERTAIN CASES.

19. *Purchase of lands—fraud—equitable relief.* The defendant M., having secured an option for the purchase of certain lands from one W. at a price named, entered into an agreement with the plaintiffs and his codefendants for the purchase of said lands jointly, wherein the defendant G. was authorized, as trustee for the other parties to the contract, to take the title to said lands and pay W. therefor a sum equal to twice the amount agreed to be paid by M., it being represented by M. and G. that such sum was the price asked by W. The purchase having been consummated at the option price made to M., and the difference between that sum and the price which G. was authorized to pay under said contract having been converted by M. and G. to their own use, the plaintiffs brought this action to quiet the title to the property in themselves. *Held*, that the court having denied the specific relief asked by the plaintiffs, it properly rendered judgment against M. and G. for the proportion of the excess over the option price paid by the plaintiffs. *Iler v. Griswold*, 442.

20. *Breach of contract by vendee.* The contract between the plaintiff and defendants was made in the month of April, and was for blocks for seventeen hundred and fifty yards of paving, but contained no provision fixing time for delivery. The contract for paving between the defendants and the city, however, provided for thirty-five hundred yards of granite paving, besides a quantity of brick paving, and that work thereon should commence on or before April 15, and be com-

DAMAGES. AWARD OF IN CERTAIN CASES. *Continued.*

pleted on or before August 15. No demand was made for the blocks to be furnished by the plaintiff until the eighth of May, when the defendants telegraphed the plaintiff that they must ship the balance of blocks, being for twelve hundred and fifty yards of paving, within three days. Afterwards the defendants examined two of the ten carloads of blocks shipped by the plaintiff, and, finding some of them defective in quality and size, refused to receive them, without giving the plaintiff notice of their defective character, or giving him an opportunity to furnish blocks that would conform to the contract. *Held*, that the evidence warranted a recovery by the plaintiff in damages for the breach of the contract. *Loftus v. Riley & Co., 503.*

21. *When of both public and private nature.* One may recover for damages sustained by a nuisance though the damage sustained by him be of the same character as that sustained by the public, if the private damage be distinct from that suffered by the public. *Harley v. Merrill Brick Co., 73.*

22. *Liability of one of several contributors.* It appeared from the evidence that the plaintiff's dwelling was situated about six hundred feet from certain tile works, that a railway was operated in the vicinity, that large quantities of soft coal were burned in the city, and that the smoke from the tile works, from the railway locomotives, and perhaps from the city at large, contributed to the injuries of which the plaintiff complained. *Held*, that the trial court erroneously instructed the jury that to constitute the defendant's works a nuisance the operation of its works alone could be considered, and that the creation of a nuisance by the smoke, soot or gas given off by the defendant's works being combined with that given off by other industries would not render the defendant liable in an action against it alone. The rule being that each person who acts in maintaining a nuisance is liable for the resulting damage; such liability, however, being limited to the results of his own action if he acts independently. *Id.*

PLEADING.

23. *Negligence—personal injury—loss of time.* Where damages for loss of time are claimed, because of injuries causing permanent disability, it is not necessary that the petition allege the character of the plaintiff's occupation, and the amount of his earnings, to authorize proof of such facts upon the trial. *Flanagan v. Baltimore & O. Ry. Co., 639.*

OBJECTIONS TO EVIDENCE. See Practice & Procedure, 9.

DECREE.

CONSTRUCTION. See Words and Phrases, 2, 4.

DEEDS. See Conveyances; Mortgages of Real Property; Sales.

DISTRICT COURT RULES.

TRIAL NOTICES.

*Practice—causes continued before answer.* District court rule number 2, requiring that parties desiring to bring a cause, once continued, on for trial, shall file with the clerk a notice of trial at least ten days before the term, is not applicable to cases continued before answer is filed. *Erickson v. Barber Bros., 367.*

DOWER. See Wills, 1.

EASEMENTS. See Conveyances, 7.

EJECTMENT.

OF LESSEE.

*Action for possession of leased premises.* Where one has come rightfully into the possession of leased premises, an action will not lie against him to recover possession until his right of possession has been terminated in the manner provided by law. *Lee v. Lee, 565.*

See Forcible Entry and Detainer.

EQUALIZATION, BOARD OF.

POWERS.

*General increase of assessment by board.* Where, pursuant to the order of the board of supervisors, the different classes of property in a county have been assessed at a valuation of a uniform per centum of the actual cash value, the supervisors cannot afterwards, when sitting as a board of equalization, make a general increase in the assessment of a particular class of property, so as to make the per centum of the valuation of such class greater than the per centum of valuation of any other class. *Manson Loan & Trust Co. v. Heston, 377.*

EQUITY.

JURISDICTION.

1. *Practice—general prayer.* A prayer for general equitable relief in an equitable action will not authorize a decree giving affirmative relief for which no foundation has been laid in the pleadings. *American Emigrant Co. v. Fuller, 599.*

2. *Quieting title—identification of swamp lands.* Where the secretary of the interior has failed to identify any swamp lands lying within the state, the question whether certain lands claimed under the swamp-land act of congress of 1850 are of the character described in said act may be determined by courts of equity in actions to quiet title thereto. *Id.*

3. *Practice—confession of judgment attacked for fraud—equitable relief—motion.* A confession of judgment alleged to have been made through collusion between the parties thereto for the purpose of

EQUITY. JURISDICTION. *Continued.*

defeating the claims of another upon the property of the judgment debtor cannot, upon such grounds, be attacked by a motion, filed as in the same case before approval, and praying that the judgment of confession be held to be collusive, fraudulent and void, that the same be set aside, that an execution issued thereon be recalled, and for other equitable relief. *Dullard v. Phelan, 471.*

4. *Purchase of lands—fraud—damages.* The defendant M., having secured an option for the purchase of certain lands from one W. at a price named, entered into an agreement with the plaintiffs and his codefendants for the purchase of said lands jointly wherein the defendant G. was authorized as trustee for the other parties to the contract, to take the title to said lands and pay W. therefor a sum equal to twice the amount agreed to be paid by M., it being represented by M. and G. that such sum was the price asked by W. The purchase having been consummated at the option price made to M., and the difference between that sum and the price which G. was authorized to pay under said contract having been converted by M. and G. to their own use, the plaintiffs brought this action to quiet the title to the property in themselves. *Held*, that the court having denied the specific relief asked by the plaintiffs, it properly rendered judgment against M. and G. for the proportion of the excess over the option price paid by the plaintiffs. *Iler v. Griswold, 442.*

5. *Award of damages.* Where, in an equity cause, an answer is filed by the defendant, and the plaintiff is found to be entitled to equitable relief, but the rights of the parties can be more definitely measured by an award of damages, the court may grant such relief as would be consistent with the case made by the petition, and embraced within the issue, were the action at law. *Id.*

FRAUD.

6. *Deed—delivery—cancellation.* The plaintiff, being the owner of a house and lot worth one thousand dollars, and occupied by him as a homestead, entered into a written agreement with the defendant to trade the same for eighty acres of land, which the defendant said he had not seen, but represented that it was worth twenty-five hundred dollars, and adapted to farming and suitable for a home. Under the agreement the plaintiff was to see the land before closing the deal, and if the trade was made he was to assume an incumbrance of one thousand and fifty dollars against the land. Subsequently the parties went to the office of the defendant's lawyers, executed deeds to their respective properties, the written agreement was destroyed, the recording fees for the two deeds were paid to the attorney, and thereupon the plaintiff left the office to go to see the defendant's land. The evidence of the respective parties as to whether a delivery of the deeds was assented to at this time was conflicting, but the attorney understood that the deeds were to be recorded, and sent them to the proper

EQUITY. FRAUD. *Continued.*

office for that purpose. The evidence showed that the plaintiff was inexperienced in business, ignorant and confiding, while the defendant was capable and awake to his own interest. The land being found worth not over five hundred dollars, the defendant asks that his deed be canceled. *Held*, that the evidence did not show that the plaintiff had assented to a delivery of his deed, and as the defendant would gain an unconscionable advantage over the plaintiff by the trade if enforced, the latter was entitled to the relief asked. *Berkshire v. Peterson, 197.*

EVIDENCE.

7. *Cancellation of deed—agreement to convey.* In an action brought to cancel a deed to certain farm lands, and to compel a reconveyance of an undivided one-half interest therein, *held*, that upon the evidence introduced the equities of the case were with the plaintiff, and he was entitled to the relief demanded. *Hines v. Light, 737.*

ESTATES OF DECEDENTS.

ADMINISTRATOR'S SALE.

*Jurisdiction of court—waiver of notice—collateral attack.* Where about four years after the issuance of letters of administration in this state, upon the estate of a deceased non-resident, during which time no claims had been filed against the estate, the administrator made application for permission to sell certain real estate, situated in the same county, for the payment of debts, and accompanying said application was a statement of account in favor of the administrator in a sum about equal to the value of said real estate, upon which was indorsed the statement, that said account was just and true, and that the goods and estate of the deceased in Iowa ought to be sold for the purpose of liquidating the same, which indorsement was signed by the administrator of the same estate in Massachusetts, and by the widow of the deceased, also a resident of said state, on behalf of herself, and as guardian for her minor children; *held*, that the indorsement upon said account operated as a waiver of notice by the widow of the application to sell, and that the court having jurisdiction of the subject-matter, a sale of said real estate in pursuance of an order of court upon said application was valid as against the widow. *Bacon v. Chase, 521.*

ESTOPPEL.

BY DEED.

1. *Authority to lease.* One who, as agent, has leased lands to another for a term of years, will not be heard upon his subsequently acquiring title to the demised premises to claim that said lease was made without authority, and that such fact was known to the lessee. *Lee v. Lee, 565.*

ESTOPPEL. BY DEED. *Continued.*

See Insurance (Fire), 2.

IN PAIS.

2. *Acceptance of dues by mutual benefit association.* The deceased had become delinquent in the payment of his dues to the Evening Star Lodge, but no action was taken by the lodge suspending him from membership, and before his death these dues were paid. After his death the loss was reported, and an assessment made to pay the same, in which he was stated to be entitled to all the benefits of the order. *Held,* that notwithstanding by the constitution of the order the deceased was suspended from membership upon his default in the payment of dues without any action being taken thereon, the defendant was estopped by its action from claiming that the deceased was not a member in good standing at the time of his death. *Warnebold v. Grand Lodge, 23.*

3. *Silence during erection of nuisance—conduct not inducing action.* One's silence during the construction of a smokestack and brick kiln in the vicinity of his premises will not estop him from subsequently proceeding against the same as a nuisance, if the erection of such works was not induced thereby. *Harley v. Merrill Brick Co., 73.*

4. *Silence of lienholder during sale of property—crops—innocent purchaser.* Where a landlord, having a lien for the rent of farm lands upon crops grown upon the premises, permitted the crops to be harvested and carried to market, and there sold to a purchaser without notice of his lien, in reliance upon the tenant paying him the rent out of the proceeds, *held,* that the landlord was estopped from asserting any claim to the crop sold as against such purchaser. *Wright v. Dickey Co., 464.*

5. *Report of claim by administrator—limitation of actions—commencement of suit.* Where a claim was filed in proper form against the estate of a decedent, of which no notice was served upon the administrator, but upon which a partial payment was made by the administrator, and an offer made for the payment of the balance in real estate, and which, in a petition for the sale of real estate, was reported by the administrator to the court as a valid claim against the estate, *held,* that the filing of the claim was the commencement of proceedings for its allowance, and stopped the running of the statute of limitation; and that the defendant was estopped by his acts from setting up the statute because no notice was served as provided by section 2408 of the Code. *Wilson v. McElroy,* 293.

See Limitation of Actions, 8, 9.

EVIDENCE.

RELEVANCY.

1. *Nuisance—private injury.* The existence of an alleged nuisance cannot be shown by evidence of the effect of the operation of the

EVIDENCE. RELEVANCY. *Continued.*

defendant's works upon people and property not in controversy *Harley v. Merrill Brick Co., 73.*

2. *Value of defendant's works as evidence.* Under the issue of estoppel pleaded by the defendant, *held,* that evidence of the value of the defendant's works was properly admitted. *Id.*

3. *Date of instrument.* The lease in question purporting on its face to have been made on Monday, and no issue being raised as to the day on which the same was entered into, the court properly excluded evidence to show that it was made on Sunday. *Lee v. Lee, 565.*

4. *Forcible entry and detainer—facts explaining possession.* In an action for forcible entry and detainer, testimony that the defendants had been in possession of the premises in question under a lease from a person named for a term of two years, and raised crops thereon; that at the time in question they were still in possession, and that they had leased the premises for the succeeding year, is admissible to explain the possession of the defendants, and to disprove that they obtained possession through force, fraud or stealth. *Peddicord v. Kile, 542.*

5. *Sales—future delivery—agreement as to quality—performance.* A contract for the sale and future delivery of granite blocks for paving the streets of a city contained certain specifications designating the quality and dimensions of the blocks to be used by the paving contractor, and providing that in no case would the contractor be allowed to use blocks other than those described in the specifications, or which should be approved by the city engineer. Some of the blocks shipped by the plaintiff to the defendants under said contract having been objected to by the city officials, the defendants refused to receive any of the blocks shipped. *Held,* in an action by the vendor against the vendee for the breach of said contract, that the plaintiff was properly permitted to show that the blocks furnished by him were as good as those laid by the defendants and accepted by the city. *Loftus v. Riley & Co., 503.*

6. *Liverymen—defective appliances.* The plaintiff employed the defendant, who was a liverymen, to convey her to a place named, and claimed that in the course of the journey she was thrown from the wagon employed for that purpose by reason of a defective fastening, which was designed to secure the seat which she occupied to the bed of the wagon. *Held,* that witnesses who did not see the fastening at the time of the accident, but who saw it when it was in the same condition as when the plaintiff was injured, were properly allowed to testify as to its condition. *Erickson v. Barber Bros., 367.*

7. *Action on insurance policy—financial condition of insured.* The premises set on fire being the property of the defendant, *held,* that certain drafts, drawn by the defendant partly before and in part after

EVIDENCE. RELEVANCY. *Continued.*

the fire, and evidencing an indebtedness that existed mostly at the time of the fire, were properly admitted on behalf of the state for the purpose of showing the defendant's financial condition at the time of the fire. *State v. Hull, 112.*

COMPETENCY.

8. *Parol testimony inadmissible to vary written contract.* The plaintiff undertook by a contract in writing to construct a brick sewer for the defendant according to written plans and specifications at a certain price per lineal foot. By the terms of the contract he agreed to make all necessary excavations, and furnish, at his own expense, all necessary materials and labor. In making the excavation the plaintiff found it necessary to remove a large quantity of rock in order to put the sewer in place, which involved an expenditure of several hundred dollars more than would have been incurred if the excavation had been composed wholly of earth. *Held,* that parol evidence was inadmissible to show that when the contract was made the parties thereto supposed that the excavation would be of earth alone. *McCauley v. Des Moines, 212.*

9. *Parol testimony inadmissible to vary written contract.* Where a lease for a hotel provided that the lessee should make all improvements he might deem necessary in the house at his own expense, but that all outside and permanent improvements were to be done at the expense of the lessor, and the cost thereof deducted from the rent, *held,* that the lessee was not entitled under such provision to reimburse himself for the cost of placing a heating furnace in the house, and that evidence of a verbal agreement of the lessor to allow the lessee for the cost of the same was inadmissible. *Smith v. Hess, 238.*

10. *Parol evidence competent to contradict return of officer.* Where it appeared that the return of the officer upon an original notice had been altered, and that the return in fact made by him was not in existence, *held,* that it was competent to prove the date of the service of such notice by parol evidence. *McComb v. Council Bluffs Ins. Co., 247.*

11. *Statute of frauds—contract for sale of real estate—parol evidence.* Parol evidence of an agreement to sell and convey real estate, where part of the purchase price has been paid, is competent under section 3665 of the Code. *Pressley v. Roe, 545.*

12. *Revenue laws—deeds—secondary evidence.* The records of conveyances of real estate, executed at a time when the internal revenue laws required that stamps be attached thereto and canceled, are admissible in evidence without proof that stamps were affixed to the originals, as provided by law, unless it appears that such stamps were omitted with the purpose to defraud. *Mathews v. Culbertson, 434.*

EVIDENCE. COMPETENCY. *Continued.*

13. *Non-expert testimony as to physical condition.* In an action for damages sustained from an assault made upon the plaintiff by the defendant the plaintiff claimed that at the time of the assault she was pregnant, and that the abuse of the defendant produced an abortion, and injured her health to such a degree as to render her unable to perform the labor which before that time she was accustomed to do. *Held*, that a non-expert witness for the plaintiff, who was acquainted with her, and saw her frequently, was properly permitted to testify that the plaintiff's physical condition was one of feebleness and inability to do hard work. *Stone v. Moore, 186.*

14. *Testimony of experts—christian scientist.* A female physician who has attended a regular medical school, and has practiced her profession, but who had since abandoned the regular practice of medicine and adopted Christian Science as the proper method of healing the sick, *held*, to be competent to testify as an expert as to the result of her examination of the plaintiff, and to state the symptoms complained of by her. *Id.*

15. *Testimony of experts—physical injuries.* In an action to recover damages on account of injuries sustained through the negligence of the defendant, it is competent for a physician, who has treated the plaintiff for such injuries, to testify as to the location thereof, whether they have been recovered from, and, if not, whether that fact would indicate that the injuries were permanent. *Erickson v. Barber Bros., 367.*

16. *Testimony of experts—proof of signature.* Where the signature to an assignment of an account by a partnership was disputed, *held*, that one who had corresponded with the firm, and knew its signature only as it had been communicated to him in that way, might testify that the signature to such correspondence was the same as that affixed to the assignment. *Murray v. Walker, 202.*

17. *Opinions—negligence—personal injury.* In an action against a railroad company to recover damages for the death of one of the defendant's engineers, caused by the derailment of the train upon which such engineer was employed, it appeared that the ice in a stream crossed by defendant's road, and at the point where the accident occurred, had so lodged against the bridge crossing said stream, and against and upon the approach thereto, as that when struck by the engine the rails on the approach on one side were loosed for some distance, and the engine and cars were derailed. *Held*, that the question, put to a witness who visited the place four or five hours after the accident occurred, whether any ice that was there appeared to have been struck by the engine, was not objectionable as calling for an opinion. *Scagel v. Chicago, M. & St. P. Ry. Co., 380.*

18. *Opinion of attorney.* Proof of the expression of an opinion by an attorney as to the law applicable to a case, *held*, competent as a

part of a material conversation between the plaintiff and the testator's agent, and as tending to explain the subsequent conduct of the parties. *Bellows v. Litchfield, 36.*

19. *Life tables.* Johnson's New Universal Encyclopedia, being a standard work upon matters of science and art, is competent as evidence of the Northampton and American life tables, for the purpose of showing the expectation of life of an individual. *Scagel v. Chicago, M. & St. P. Ry. Co., 380.*

20. *Market value of property.* In an action upon an insurance policy to recover for the loss of personal property insured, proof of the price at which the owner offered to sell the property within two weeks preceding the fire is competent on behalf of the defendant as tending to show the market value of the property destroyed. *Joy, Wright & Hudson v. Security Fire Ins. Co., 12.*

21. *Affidavit upon which search warrant was issued as evidence.* A set of duplicate keys to the burnt building, which were missing, being found upon search in the vault of an out-house, the state claimed that they were put there by the defendant, while the defendant claimed that they were placed there by a detective who was working against him, and who directed the search. *Held,* that it was competent to rebut the defendant's claim by the introduction in evidence of an affidavit of the county attorney, upon which a search warrant was issued, and under which search was being made when the keys were found. *State v. Hull, 112.*

22. *Acts of officer of unincorporated association.* Where it is sought to subject one of the officers of an unincorporated association to liability for the indebtedness of such association, *held,* that it might be shown in proof of such person being an officer of the association that others who were advertised as officers of said association, as was the defendant, acted in such official capacity in fact. *Murray v. Walker, 202.*

23. *Negligence—municipal corporations—defective sidewalks—notice—personal injury.* In an action against a city for damages on account of injuries sustained through stepping in a hole in the sidewalk, the plaintiff was inquired of as to what was the condition of the sidewalk between her house and the corner, that being the place where the accident occurred, and she was permitted to answer that the walk was rickety, and had a number of holes in it. *Held,* that the testimony was competent as showing the general defective condition of the walk, which should have been known to the officers of the city, and, if known and repaired, would have included the defect in question. *Munger v. City of Waterloo, 559.*

24. *Negligence—municipal corporation—defective sidewalk—size of hole in walk.* The size of the hole into which the plaintiff stepped being in evidence, *held,* that evidence as to whether the hole was

EVIDENCE. COMPETENCY. *Continued.*

large enough lengthwise so that a person walking crosswise of the hole could have put his foot in it, was properly excluded, as the question left the size of the foot entirely to inference. *Id.*

25. *Negligence—municipal corporation—defective sidewalk—condition after accident.* Evidence of the condition of the walk in such case two months after the accident may be properly admitted when it is shown that the walk was in a like bad condition since long prior to the date of the injury. *Id.*

26. *Grade of railroad—recollection of witness.* A witness having testified as to the relative height of the defendant's track at the place of the accident, and on the main bridge, *held*, that for the purpose of showing what the grade was at the time of the accident, and the judgment and recollection of the witness concerning it, he was properly permitted to testify that since the accident the grade of the defendant's road at that point had been raised about one foot. *Scagel v. C., M. & St. P. Ry. Co., 380.*

27. *Transactions with decedents.* In an action based upon transactions between a father and his son, both of whom were deceased at the time of the commencement of the action, one interested as heir to the father's estate in the result of such action may be examined as a witness concerning the contents of personal communications from the father to the son, knowledge of which was acquired without personal communication with either of the deceased persons. *Gable v. Hainer, 457.*

28. *Perjury—error without prejudice.* The defendant was indicted for the crime of perjury alleged to have been committed by him in a case wherein he was on trial for the crime of receiving a bribe. In his capacity of constable the defendant had seized certain intoxicating liquors, and it was claimed that he and another constable acting with him agreed with the owner to obtain the release of the liquors in consideration of the payment of one hundred dollars. The liquors were released upon the recommendation of one or the other of the officers, and the money, it was alleged, was paid to the constable acting with the defendant in bills of the denominations of fifty, twenty and ten dollars. Before the payment of the money the bills were marked by the owner of the liquors, and a memorandum describing the bills, and the marks upon them, was made. Within a few hours after the payment both officers were arrested and searched, and a fifty-dollar bill found upon the defendant, and bills of the other denominations were found upon the other constable. A memorandum of the bills so found was made by the justice before whom the constables were searched, and that justice and another together made a second memorandum. The witnesses who made the above memoranda testified positively to the correspondence of the same with the money found upon the defendant, and this the defendant, testifying in his own

EVIDENCE. COMPETENCY. *Continued.*

behalf, did not deny, but claimed that the bill found upon him had been received from a bank some days prior to his arrest. *Held*, that while the memoranda were not competent as original evidence, their introduction could not have been prejudicial to the defendant. *State v. Potts, 317.*

29. *Plea of former adjudication—general denial.* Where, in an action to quiet title to land, the plaintiff pleaded a certain judgment as a final adjudication of the claims of the defendant, to which the defendant answered merely by general denial, *held*, that the jurisdiction of the court was not put in issue by the answer, and that the record of the judgment was competent evidence in support of the averments of the petition without proof of the service of process therein, nor of the pleadings. *American Emigrant Co. v. Fuller, 599.*

30. *Court files.* An execution found with the papers in a cause, and purporting to have been issued therein, but not bearing the clerk's seal nor filing mark, is not admissible in evidence in another action in proof of its having been issued in such cause. *Benjamin v. Shea, 392.*

31. *Attachment—officer's return.* The words, "duly served," contained in an entry upon the appearance docket of the district court indicating the return of a writ of attachment, issued in the cause, are not admissible in evidence in proof of the service of such writ. *Id.*

32. *Title to land.* The testimony of an alleged owner of real estate is not competent in proof of his title. *Id.*

33. *Declarations in absence of interested party.* The defendant offered to show that a delegate from the Evening Star Lodge to the grand lodge at the time a certain resolution was adopted made a verbal report of said resolution at a meeting of the former lodge. *Held*, that it appearing that the deceased was not present at such meeting the evidence was properly excluded. *Warnebold v. Grand Lodge, 23.*

See Damages, 11.

PROOF OF PARTICULAR ISSUES.

34. *Judgments—interpretation—extrinsic evidence.* The lands in controversy were not described in the judgment, but it was decreed therein that the county of C., through whom the defendants in this action claim title, was estopped from impeaching the title of the plaintiff herein to the lands entered in the name of said county with the swamp land indemnity scrip; that it should convey said lands to the plaintiff, and should not impeach the validity of the contract in relation to said lands between said county and the plaintiff, dated December 12, 1861. To show that the decree applied to the lands in controversy the plaintiff offered in evidence an agreement which recited that it was made on December 12, 1861, but pur-

EVIDENCE. PROOF OF PARTICULAR ISSUES. *Continued.*

ported to have been signed December 18, 1861, and a deed which referred to the contract as of December, 1861. *Held*, that, in the absence of evidence that other contracts and deeds were made on the dates named, said instruments were sufficient to show that so much of the land in controversy as is swamp land was a part of that referred to in the above judgment. *American Emigrant Co. v. Fuller, 599.*

35. *Partnership—accounting.* Where in an action for an accounting between partners it appeared that an agent employed to make purchases of live stock on behalf of the firm, and also for one of the members of the firm individually, commingled the funds of the firm and of the individual partner by depositing the same in one account in his own name, and the evidence showed that some of the money of the firm was invested by tne agent for the use, and benefit of the individual partner, and had not been accounted for, but the evidence as to the amount thereof was voluminous and conflicting, yet favored the finding of the referee that the amount so appropriated was about thirteen hundred dollars, *held*, that the fact that the copartner charging the misappropriation had at all times access to the books of the firm, and was capable of discovering the fraud if practiced, was controlling against his claim that the amount of such misappropriation was as great as seventeen thousand dollars. *Yetzer v. Applegate, 726.*

SUFFICIENCY TO SUSTAIN VERDICT IN PARTICULAR CASES.

36. *Railroads—negligence—fire.* In an action to recover damages sustained by the destruction of certain hay, fence posts and growing trees, by fire alleged to have been set by sparks from the defendant's engines, it appeared that the fire started in a field about one hundred and sixteen feet from the defendant's right of way, and several witnesses testified that the fire was first seen within a few minutes after the passing of one of the defendant's trains, and that no fires and no person setting fires had been seen in that vicinity that day. *Held*, that, notwithstanding the absence of all evidence as to the extent and course of the wind at the time of the fire, the evidence was sufficient to sustain the finding that the fire was set by defendant's engine. *Greenfield v. Chicago & N. W. Ry. Co., 270.*

37. *Promissory notes—indorsement in blank—parol evidence.* Where in an action against one upon his indorsement in blank upon a promissory note the defendant relied, as a defense thereto, upon proof of an oral agreement, alleged to have been made at the time of said indorsement, that the plaintiff was to take the note without recourse on the defendant, and the preponderance of the direct evidence to the fact of such agreement was with the plaintiff, but it appeared that the consideration received by the defendant for the transfer of said note was considerably less than the face value thereof, *held*, that a verdict for the defendant would not be set aside as not being supported by the evidence. *Truman v. Bishop, 697.*

EVIDENCE. SUFFICIENCY TO SUSTAIN VERDICT IN PARTICULAR CASES. *Continued.*

38. *Verdict of assault with intent to commit manslaughter.* The defendant, while assisting a husband in the forcible abduction of his wife from the house of her parents, where she was residing, became engaged in a conflict with the wife's father, and in the course thereof a revolver held by the defendant in his hand was discharged, inflicting a wound in the father's knee. The defendant claimed that the revolver was discharged by accident. *Held*, that evidence was sufficient to support a verdict of an assault with intent to commit manslaughter. *State v. Postal, 460.*

39. *Railroads—defective roadbed—negligence.* The evidence tended to show a faulty construction of the defendant's roadbed at the place of the accident, that many of the ties were in bad condition, and not suitable for use, and that the provision for the passage of water under the bridge was insufficient; that the deceased had not been informed of anything that required unusual care at the place of the accident, though he had been warned to guard against danger at two other places; that he seemed to have managed his engine with reasonable care; that before the place of the accident was reached the deceased had applied the airbrakes, but had released them when the level track, within a short distance of the bridge, was reached; that he was in his proper place, looking ahead, when the accident occurred, but a fog prevented him from seeing the ice on the track until too late to check the train, and avoid the collision in which he was killed. *Held*, that the jury were justified in returning a verdict against the defendant for damages for the death of the engineer. *Scagel v. Chicago, M. & St. P. Ry. Co., 380.*

40. *Railroads—defective roadbed—negligence.* There being evidence tending to show that a large part of the railroad ties at the place of the accident were of soft wood, and broken off at the south rail of defendant's road, and that the ends of others were "combed out" by the spikes which were forced through them by lateral pressure, *held*, that the jury was warranted in finding that the train was *supposed* to have been derailed by coming in contact with ice, and the giving away of the ties, and that the use of the word supposed was not objectionable. *Id.*

41. *Railroad—defective roadbed.* It appearing that when the defendant's section foreman examined the bridges a few hours before the accident the river was then rising rapidly, that the stream was accustomed to rise rapidly, and had been as high several times before since the defendant's railway had been constructed, and that twelve or fifteen years before the track at the same point had been washed out, *held*, that the finding of the jury that the defendant was guilty of the want of ordinary care in patrolling its track was supported by the evidence. *Id.*

EVIDENCE. SUFFICIENCY TO SUSTAIN VERDICT IN PARTICULAR CASES. *Continued.*

42. *Railroads—negligence.* The only evidence that the car complained of by the plaintiff was defective was, that while the same was being moved by pushing the car ahead of an engine over the defendant's track it was derailed on a curve. On the other hand it appeared that the car was carefully examined by the defendant's car inspector the day before the accident, and by the car inspector and the foreman of the engine house the day after the accident, and found each time to be in perfect order. It further appeared that the truck used with the car in question was in general use in six states, and is used by many of the leading railroads of the country acceptably. *Held*, that a verdict for the plaintiff was not supported by the evidence. *O'Conner v. Ill. Cent. Ry. Co., 105.*

43. *Agency.* In an action upon a promissory note given for a cornsheller the defendants claimed that the sheller was sold to them by one L. as agent for the plaintiff, and pleaded a breach of the warranty made by L. The evidence showed that the sheller was sold by L. to the defendants, but there was no direct testimony to L.'s agency for the plaintiff, nor that L. assumed to be such agent, and the manager of plaintiff's business testified that L. was not its agent. *Held*, that the finding of the jury that L. was the agent of the plaintiff was not supported by the evidence. [ROBINSON, J., *dissenting.*] *Sandusky Machine Works v. Hooks, 305.*

BURDEN OF PROOF.

44. *Fire insurance—value of property.* The provisions of section 3, chapter 211, Acts of the Eighteenth General Assembly, that in any action upon a policy of insurance for the loss of any building insured "the amount stated in the policy shall be received as *prima facie* evidence of the insurable value of the property at the date of the policy," have no application to cases of the loss of personal property. *Joy, Wright & Hudson v. Security Fire Ins. Co., 12.*

45. *When assumed by party on trial—practice in supreme court.* Where the title to real estate was in issue, and the plaintiff in his pleadings and upon the trial assumed the burden of proof thereon, *held*, that upon appeal the plaintiff would not be heard to claim that the burden of proof as to such issue was upon the defendant. *Benjamin v. Shea, 392.*

IRRESPONSIVE ANSWERS.

46. *May be stricken out on motion.* An irresponsive answer by a witness may be stricken out on motion of the party by whom the witness was called. *Murray v. Walker, 202.*

EXECUTION.

PROPERTY LIABLE TO.

1. *Homestead—sale—investment of proceeds in another state—exemption.* Where the proceeds from a sale of a homestead in this state are

EXECUTION. PROPERTY LIABLE TO. *Continued.*

invested in the purchase of a homestead in another state they no longer possess the homestead character, so far as the laws of this state are concerned, and in the event of a resale of such homestead in the foreign state, and the reinvestment of the proceeds in a homestead in this state, the latter will be liable for debts antedating the last investment. *Dalton v. Webb, 478.*

2. *Proceeds of fire insurance policy.* Where personal property exempt from execution, under section 3072 of the Code, is destroyed by fire, the avails of an insurance policy upon such property is likewise exempt. *Reynolds v. Haynes, 342.*

3. *Investment of pension money—subsequent exchange of property.* Where property purchased wholly with pension money was exchanged by the pensioner for other property of greater value, but without the investment of any additional sum of money, *held,* that the property so received was not subject to execution to the extent of its excess in value over the property given in exchange. *Smith & Co. v. Hill, 684.*

4. *Pension money—support of insane.* Pension money in the hands of a guardian of the estate of an insane person, which was received from the United States after chapter 23 of Acts of the Twentieth General Assembly took effect, is not liable for expenses incurred and paid by the county for the support of such insane person after the receipt of said money from the government, and before an order appropriating out of said estate for future support had been made. *Fayette County v. Hancock, 694.*

PROPERTY EXEMPT.

5. *Construction of statute—team—laborer.* One who is the head of a family, and who is engaged in the sale of oils at retail from a tank wagon, which is sometimes driven by himself, and sometimes by his minor son, and who also makes sales from a storeroom where his oils are stored, but who makes the greater part of his sales from the wagon, and earns his living thereby, is a laborer, who habitually earns his living by the use of a team and wagon, within the meaning of section 3072 of the Code, and is entitled to hold such team and wagon exempt from execution. *Consolidated Tank-Line Co. v. Hunt, 6.*

See Homestead, 1.

LEVY.

6. *Abandonment of.* After acquiring title to a chattel mortgage the plaintiffs caused execution to issue upon a judgment held by them against the mortgagor, and had the same levied upon the mortgaged property. Afterwards they served notice of their ownership of said property under said mortgage, and demanded the possession thereof, and its release from levies of execution and attachment in favor of certain other creditors of the mortgagor. *Held,* that the plaintiffs

were entitled to the possession of said property by virtue of said mortgage, but that their demand upon the sheriff for possession operated as an abandonment of their levy upon the property under said execution, and left the property freed from all the writs in the sheriff's hands. *Blotcky Bros. v. O'Neill, 574.*

LEVY ON MORTGAGED PROPERTY. See Attachment, 3.

REDEMPTION.

7. *Decree—performance—extension of time by appeal.* Where in an action to redeem from a judicial sale the plaintiff was awarded the right of redemption if made within ninety days after the rendering of the decree, but redemption within such time was prevented by the appeal of the defendant to the supreme court, *held*, that the plaintiff was entitled to ninety days after the affirmance of the judgment in the supreme court in which to redeem. *Schlawig v. De Peyster, 323.*

8. *Sale—inadequacy of consideration—fraud—redemption.* Where in an action against the occupants of a building, and one holding a legal title to the real estate, to abate the keeping of a saloon nuisance, judgment was rendered against the defendants for costs including an attorney's fee, to the amount of thirty-one and fifty-hundredths dollars, and under a general execution issued thereon real estate of the value of ten thousand dollars was sold for the amount of said judgment to the attorney for the plaintiff, who thereafter assigned the certificate of sale to the sheriff executing said writ, to whom a deed afterwards issued, and it appeared that no lien was established by said decree against the land, *held*, in view of the inadequacy of the consideration, that one who took a conveyance of the property pending the injunction proceeding, and who was not a party to such proceeding, nor had actual notice thereof, and commenced an action to set aside said sale and deed within a few days after said sale was made, was properly allowed to redeem said property upon the payment of the judgment and costs down to the time execution issued. *Lehner v. Loomis, 416.*

9. *Foreclosure of mortgage—right of possession.* An adjudication entitling persons interested in real estate to redeem from a foreclosure sale thereof after the expiration of the statutory period for redemption will not entitle such persons, nor those claiming under them, to the possession of such property during the extension of time for redemption, and after the delivery of a sheriff's deed under said sale. *Stanbrough v. Cook, 705.*

EXEMPTIONS.

OF PROPERTY EXEMPT FROM EXECUTIONS. See Homesteads, 1, 2; Execution, 2, 3, 4, 5.

FINES.

POWER OF CITIES AND TOWNS TO IMPOSE. See Nuisance, 1.

FORCIBLE ENTRY AND DETAINER.

EVIDENCE.

*Parties holding under lease.* In an action for forcible entry and detainer, testimony that the defendants had been in possession of the premises in question under a lease from a person named for a term of two years, and raised crops thereon, that at the time in question they were still in possession, and that they had leased the premises for the succeeding year is admissible to explain the possession of the defendants, and to disprove that they obtained possession through force, fraud or stealth. *Peddicord v. Kile, 542.*

FORECLOSURE. See Lis Pendens; Execution, 7, 9.

FORMER ADJUDICATION.

AS TO WHAT MATTERS CONCLUSIVE.

1. *Deed—breach of warranty.* The defendant conveyed certain lands by deed, with covenants of warranty, to B., who conveyed the same to the plaintiff. At the time of the latter conveyance the plaintiff gave to B. his promissory note for six hundred and fifty dollars for a balance of the purchase money, but providing that said note was not to be paid if a certain adverse claimant established an interest in the property. Such interest was established in an action wherein the defendant and B. were parties, and B. in an action against the defendant alone, for a breach of the warranty in the deed to him, recovered the amount of the note above referred to, which the plaintiff was through the establishment of such adverse claim relieved from paying. The deed delivered by B. to the plaintiff was one of special warranty, but it being the agreement that he should have one of general warranty, the plaintiff by action against B., commenced after the rights of the adverse claimant had been determined, compelled B. to execute to him a general warranty deed. *Held,* that the latter deed being valid, and the plaintiff having paid the court costs in the case wherein the rights of the adverse claimant were established, he was entitled to recover the amount thereof from the defendant, such sum not being included in the recovery on the defendant's warranty in the action by B. *Malette v. Arnold, 55.*

AGAINST WHOM CONCLUSIVE.

2. *Adjudication of title—liability of warrantor.* At the time of the conveyance to the plaintiff one T. was in possession of the land in question, and refused to surrender possession. Thereupon the plaintiff commenced an action against T. to recover the land, and gave notice thereof to defendant's testator, with the demand that he appear in court with proofs of title necessary to give the plaintiff possession. Afterwards, at the request of the testator's agent in a personal interview, the attorney previously employed by the plaintiff was discharged, and one H. employed to conduct the suit. While H. was paid by the plaintiff for his services, the litigation was practically

FORMER ADJUDICATION. AGAINST WHOM CONCLUSIVE. *Continued.*

controlled by the agent of the defendant's testator, and for the latter's benefit. *Held*, that under the circumstances the testator was responsible for the manner in which the case was conducted, and was bound by the final result of the litigation. *Bellows v. Litchfield, 36.*

3. *Tax sale—jurisdiction—estoppel.* The territory comprising the county of Sioux being attached prior to the year 1860 to the county of Woodbury, the taxes upon lands located therein were assessed and levied for the years 1858 and 1859 by the proper officers of Woodbury county. After the organization of Sioux county in 1860, in an action brought by Sioux county against Woodbury county and the county judge thereof, it was determined by the district court of Woodbury county that the county of Sioux was entitled to collect and receive the taxes levied for the years 1858 and 1859, upon lands situated in that county, and remaining delinquent April 28, 1860. The plaintiff having brought this action to quiet his title to certain lands in Sioux county based upon a tax sale, made under the authority of the above adjudication, for the taxes of 1858 and 1859, *held*, that such adjudication never having been appealed from the defendant was estopped from denying the authority of Sioux county to make said sale. *Cannon v. Nelson, 242.*

FRAUD.

See Fraudulent Conveyances; Evidence, 35; Conveyances, 2.

FRAUDULENT CONVEYANCES.

TRANSACTIONS BETWEEN RELATIVES.

1. *Husband and wife—consideration.* Where a wife having money of her own gave the same to her husband for general use, without any agreement or expectation for repayment, until, in later years, when the husband had become insolvent, the transaction was made a means of protecting the husband's property against his creditors. *Held*, that under the evidence the trial court properly found that the conveyance was without consideration, and made for the purpose of hindering, delaying and defrauding creditors. *Cass Co. Bank v. Weber, 63.*

2. *Husband and wife—mortgage taken in part to hinder creditors—general verdict inconsistent with special finding and admissions in evidence.* The plaintiff's husband being the owner of a stock of merchandise, and being indebted to divers persons, gave to the plaintiff a mortgage on said property as security for an indebtedness to her originating more than twenty years previous. In an action for conversion against the defendant, who had seized the mortgaged property under a writ of attachment in favor of another creditor of the husband, the plaintiff testified that her purpose in taking the mortgage was partly to prevent other creditors from taking the goods. The jury returned special findings to the effect that the mortgagor was insolvent when the mortgage was executed; that he was being pressed by

FRAUDULENT CONVEYANCES. TRANSACTIONS BETWEEN RELATIVES. *Continued.*

creditors at the time; that it was because he was so pressed that he and the plaintiff talked of putting the mortgage on the property in controversy; that prior to this time the plaintiff had never made any demand of her husband for either payment or security, nor had received any written evidence of the indebtedness. *Held*, that these special findings, taken in connection with the admissions of the plaintiff in evidence, showed that the plaintiff's mortgage was taken in part to hinder or delay creditors, and being inconsistent with a special finding that the mortgage was taken without any fraudulent intent, and a general verdict in favor of the plaintiff, the defendant's motion for judgment, notwithstanding the verdict of the jury, should have been sustained. *McCreary v. Skinner, 362.*

SECRET LIEN.

3. *Effect on subsequent conveyance.* Some time before the execution of a certain mortgage the mortgagee had received a mortgage upon the firm's property to secure a part of the same indebtedness, but the same was never recorded, and when the mortgage in question was accepted, the indebtedness under the former mortgage was included therein, and that mortgage surrendered. *Held*, that as the mortgagees were claiming nothing by virtue of the former mortgage, the secret character of that lien could not affect the validity of the mortgage last executed. *Letts, Fletcher & Co. v. McMaster & Dryden, 449.*

4. *Failure of mortgagee to take possession of portion of property.* A part of the property included in the above mortgage consisted of forty hogs, which had been purchased by one D. with money borrowed of C. & L. for that purpose, under an agreement that they were to be shipped to Sioux City, sold, and the profits divided between said D. and the defendant firm. The hogs having sold for sufficient only to pay the loan, the entire proceeds were paid to C. & L. *Held*, that the mortgagees were not accountable for the value of the hogs, and their action was no evidence of fraud. *Id.*

SALES HASTILY MADE. See Sales, 2.

GARNISHMENT.

WHO MAY BE CHARGED AS GARNISHEE.

1. *Garnishment of non-resident debtor—garnishee sued in another state—abatement.* A., a corporation organized under the laws of Pennsylvania, and doing business under a license in the state of Illinois, and also in this state, being indebted to D., a corporation organized under the laws of this state, the latter assigned its claim against A. to G., a resident of this state, and gave notice thereof to A. Afterwards the firm of G. & W., creditors of D., commenced an action against D., aided by attachment, in the state of Illinois, and garnished A. The latter

GARNISHMENT. WHO MAY BE CHARGED AS GARNISHEE. *Continued.*

answered as to the assignment to G. and thereupon G., being served with notice to interplead, appeared and answered in the case in Illinois, submitting itself and its interests in the debt garnished to the jurisdiction of that court. Subsequently, and while the action in Illinois was still pending, G. commenced an action upon the assigned claim against A. in this state. *Held*, upon demurrer to an answer by A. therein, in the nature of a plea in abatement, that the laws of Illinois being presumed to be the same as those of this state, in the absence of a showing to the contrary, A. was liable to suit upon the claim of D. in the courts of Illinois, in all respects as a resident corporation of that state would be, and likewise to garnishment therefor, and, therefore, the Illinois court, by its process of garnishment, and the appearance of G. therein, had acquired jurisdiction of the claim in controversy. *German Bank v. American Fire Ins. Co., 491.*

2. *Process—extra-territorial service—voluntary appearance—waiver of jurisdiction.* The Illinois court being without jurisdiction to require G. to interplead in the garnishment proceeding, its appearance in response to the process of that court is to be regarded as voluntary, and a waiver of its right to object to the jurisdiction of the court. *Id.*

PROCEEDINGS AS TO GARNISHEE'S LIABILITY.

3. *Attacking title of garnishee—parties.* In a garnishment proceeding wherein it was sought to charge the garnishee with the possession of notes and bonds belonging to the judgment debtor, and alleged to have been transferred to him to hinder and delay the creditors of the latter, but which the garnishee claimed to have purchased of P. and W. through the judgment debtor as agent for the assignors, *held*, that P. and W. were not necessary parties. *Capital City Bank v. Wakefield, 46.*

4. *Judgment against garnishee—before trial of principal case—practice.* The trial of issues upon a garnishment in an action by attachment may be had, and a conditional judgment entered against the garnishee, before a judgment has been rendered in such action against the principal defendant. *Id.*

GRAND JURY. See Criminal Law, 1.

GUARDIANS.

APPOINTMENT.

*For feeble-minded persons.* A person of the age of seventy-nine years and possessing an estate of over five hundred acres of land, yet who appears to be capable of transacting the ordinary business involved in taking care of his property, and to understand the nature of the business and the effect of what he does, and to be able to exercise his will with reference to such business with discretion, notwithstanding the influence of others, is not a person of such unsoundness of mind as to warrant the appointment of a guardian of his property under section 2272 of the Code. *Emerick v. Emerick, 411.*

HOMESTEAD.

LIMITS OF.

1. *Partial use of premises for hotel—execution—exemption.* Where a two-story brick building, with frame additions, was used in part for a homestead and in part as a hotel, and the cellar and rooms on the first floor used for hotel purposes, were also used by the family either as a passageway between rooms occupied for homestead purposes or for ingress or egress to the premises, and the rooms in the second story, though used exclusively for hotel purposes, were inaccessible except by passage through a part of the premises occupied as a homestead, *held,* that the whole building should be treated as exempt from execution under the homestead law. *Cass Co. Bank v. Weber, 63.*

PROCEEDS OF.

2. *Sale—investment of proceeds in another state—exemption.* Where the proceeds from a sale of a homestead in this state are invested in the purchase of a homestead in another state they no longer possess the homestead character, so far as the laws of this state are concerned, and in the event of a resale of such homestead in the foreign state, and the reinvestment of the proceeds in a homestead in this state, the latter will be liable for debts antedating the last investment. *Dalton v. Webb, 478.*

HUSBAND AND WIFE.

JOINT LIABILITY ON WARRANTY IN DEED. See Sales, 8.

INDICTMENT. See Criminal Law, 1, 2, 3.

INJUNCTION.

WHAT MAY BE ENJOINED.

1. *Breach of contract—irreparable injury.* The defendant, by a resolution of its board of directors, agreed that gas for all ordinary purposes, including gas log in library, thereafter used in the then residence of the plaintiff, and including two street lamps in front of said residence in a street named in the city of Dubuque, should be free of cost for a period not exceeding twenty years. *Held,* that said contract was not void for uncertainty; and that upon the petition of the plaintiff alleging that the defendant threatened to disconnect the gas pipes, so as to wholly cut off the supply of gas to which the plaintiff was entitled under said contract, a temporary injunction should have issued restraining the defendant from said action, notwithstanding the financial responsibility of said defendant for the payment of any damages sustained by the plaintiff. *Graves v. Key City Gas Co., 714.*

2. *Previous breach by plaintiff.* Conceding that the plaintiff was using an excessive quantity of gas in violation of said contract, and that the defendant might be entitled to relief against the plaintiff on

INJUNCTION. WHAT MAY BE ENJOINED. *Continued.*

that account, *held*, that such fact would not excuse the threatened action of the defendant, nor constitute sufficient ground, for the denial of an injunction. *Id.*

3. *Relief denied—renewal of application.* The court having refused to order a temporary injunction upon the filing of the plaintiff's original petition alleging the threatened action of the defendant as above stated, the plaintiff filed an amendment to his petition alleging that the defendant had cut off the gas from the plaintiff's house by introducing water into the pipes, and renewed his application for an injunction. *Held*, that the amendment presented a different case from that of the original petition, and that the plaintiff's application for an injunction upon such new ground should have been granted. *Id.*

4. *Defense.* The fact that the defendant had been garnished upon process issued from the United States circuit court in an action there pending against the plaintiff *held* to constitute no ground for the denial of an injunction as prayed. *Id.*

5. *Destroying trees—tenants in common.* Where a row of trees grown to the height of from thirty to sixty feet upon the boundary line between two adjoining tracts of land was used as a fence by stretching barbed wire along their trunks, and served to shelter the building and stock of the owner on the south side thereof, but rendered a strip of land four or five rods wide on the north side thereof unproductive, *held*, that the owners of the adjoining tracts were tenants in common as to said trees, and that the owner on the north side might be restrained by injunction from cutting the trees down. *Musch v. Burkhart, 301.*

DISSOLUTION.

6. *Liquor nuisance—lessor's liability.* Where property was leased for a lawful purpose, and the lessee used the same for the illegal sale of intoxicating liquors without the knowledge of the lessor who, after the issuance of a temporary injunction against him because of said nuisance, notified the lessee to quit the premises, and afterwards, in good faith, prosecuted an action of forcible entry and detainer for the possession of the property, but was denied the relief sought, *held*, that upon the final hearing of the injunction proceedings the temporary injunction against the lessor was properly dissolved, and the action dismissed as to him, but that the nuisance should, nevertheless, have been abated by order of the court. *Morgan v. Koestner, 134.*

ACTION ON BOND.

7. *Damages—what may be recovered—expenses.* In an action brought by the defendant to enjoin an execution sale of certain lands and to quiet his title thereto, the injunction was, upon final hearing, dissolved, and the defendant held to hold the land in trust for the plain-

INJUNCTION. ACTION ON BOND. *Continued.*

tiff herein. *Held,* in an action upon the injunction bond that the plaintiff was not entitled to recover as damages the costs and expenses incurred in obtaining the dissolution of said injunction. *Bullard v. Harkness, 373.*

INSANE.

SUPPORT OF.

1. *Property exempt from execution—pension money.* Pension money in the hands of a guardian of the estate of an insane person, which was received from the United States after chapter 23 of the Acts of the Twentieth General Assembly took effect, is not liable for expenses incurred and paid by the county for the support of such insane person after the receipt of said money from the government, and before an order appropriating out of said estate for future support had been made. *Fayette County v. Hancock, 694.*

2. *Before statute enacted.* Neither is such money liable for expenses incurred and paid by the county for the support of such insane person before said statute was enacted. [ROBINSON, J., *dissenting.*] *Id.*

INSTRUCTIONS TO JURY.

SUFFICIENCY OF.

1. *Negligence—personal injury—contributory negligence.* Where, in an action for damages for personal injuries sustained through the negligence of a railway company, no instructions were asked or given to the jury concerning the rules of contributory negligence as affecting the plaintiff's right to recover, but the petition alleged the exercise of care on the part of the plaintiff, and it clearly appeared from the evidence that the defendant was negligent, and that the plaintiff was free from negligence, *held,* that the omission in the instructions was without prejudice to the defendant. *Flanagan v. Baltimore & O. Ry. Co., 639.*

CONSTRUED.

2. *Error without prejudice.* The accident in which the plaintiff was injured having been caused by the spreading of the rails, the defendant asked two instructions to the effect that the fact that the switch at which the car left the track was not locked did not constitute negligence, if the purpose of the lock was not to prevent spreading of the rails. These instructions the court modified, by adding the words, "If the defendant used due care and diligence, as herein expressed, to otherwise fasten and secure the switch. *Held,* that as the verdict would have been for the defendant if the jury had found that the defendant had used due care to fasten and secure the switch, the modification of the instruction was without prejudice to the defendant. *Id.*

INSTRUCTIONS TO JURY. CONSTRUED. *Continued.*

3. *Personal injury—compensatory damages—evidence.* The jury were instructed that in their determination of the amount of compensatory damages to be recovered by the plaintiff, they should allow such damages as would "fairly compensate" the plaintiff "for what he paid out or incurred for medical attendance." *Held*, that the instruction being in the alternative as to the allowance of such expenses either paid or incurred, the instruction was not erroneous though the evidence failed to show the actual payment of any sum; and that the jury must have understood from such instruction that only reasonable and necessary expenditures were to be allowed. *Id.*

4. *Promissory note—liability of indorser.* The court instructed the jury that the law presumed from the defendant's indorsement, that he guaranteed the payment of the note, and that the burden of proof was upon the defendant to show that when he indorsed said note he did not *intend* to guarantee the payment thereof. *Held*, that in view of other instructions given by the court, and the fact that the jury found specially that there was an agreement that the plaintiff should take the note without recourse, the error in the instruction was without prejudice to the plaintiff. *Truman v. Bishop, 697.*

5. *Damages—proof of every allegation in petition.* Where in an action to recover damages alleged to have been sustained through the operation of a smokestack and brick kiln by the defendant, the plaintiff averred several distinct elements of damage in her petition, *held*, that an instruction to the jury, that to entitle the plaintiff to recover she must prove each and every allegation in the petition, was erroneous. *Harley v. Merrill Brick Co., 73.*

6. *Whole charge to be construed together.* Where the jury are instructed that the law of the case is not embodied in any one instruction, and that they must consider and construe the instructions together, the fact that the law in regard to a given proposition involved in the case was not fully stated in a single paragraph will not be deemed prejudicial. *State v. Potts, 317.*

7. *Contract—performance—usage.* In an action to recover the value of certain paving blocks, it appearing that the usage is, that the vendees were required to accept the blocks which were equal to the requirements of the contract, if the plaintiff stood ready to make good the defective ones, and that the plaintiff was able and ready so to do, *held*, that the court properly refused to instruct the jury that the plaintiff was not entitled to recover if a considerable number of the blocks tendered by the plaintiff did not meet the requirements of the contract. *Loftus v. Riley & Co., 503.*

8. *Substantial performance of contract.* The court instructed the jury that the defendants were liable for the carloads of blocks not inspected by them, unless they did not conform substantially to the specifications. *Held*, that the use of the word *substantially* in such connection was not erroneous. *Id.*

INSTRUCTIONS TO JURY. CONSTRUED. *Continued.*

9. *Pointing revolver at body of another—presumption.* The court having instructed the jury that if the defendant "pointed the revolver at the leg of said L., and fired the same at said point in the body of L., * * * that he is to be presumed to have made the assault with intent to inflict great bodily injury;" and the wound made by the defendant being in the leg, just above the knee, *held*, that the latter fact did not warrant the presumption that the defendant pointed the revolver at the leg of L., intending only to inflict the wound made, and that, therefore, the verdict of assault with intent to commit manslaughter was in conflict with the above instruction. *State v. Postal, 460.*

10. *Common carrier—negligence.* It being the theory of the plaintiff that the defendant was a common carrier when employed by her, she sought to prove such fact by introducing in evidence, against the objections of the defendants, the latter's advertisement in a local newspaper as liverymen. *Held*, that the court properly refused to instruct the jury, at the request of the defendants, that "the fact that the defendants were liverymen cut no figure in the case." *Erickson v. Barber Bros., 367.*

11. *Defective sidewalk—personal injury—contributory negligence.* In its instruction with reference to the plaintiff's freedom from negligence, the court directed the jury to take into consideration "the defective condition of the walk at and prior to the time of the injury," as alleged in the plaintiff's petition, her knowledge thereof, and her ability to walk thereon. *Held*, that it not being the purpose of such instruction to inform the jury as to the defendant's negligence, but that of the plaintiff, the language was not prejudicial when construed with the other instructions given. *Munger v. City of Waterloo, 559.*

12. *Defective sidewalk—personal injury—knowledge of city.* The court having stated very minutely the facts upon which the plaintiff sought to recover, and instructed the jury that the plaintiff's recovery must depend upon such facts being sustained by the evidence, it was not erroneous to instruct the jury that if the walk had been "notoriously bad and out of repair," and if the city undertook to repair the "defective" walk, and left it in "an unsafe condition," it would be presumed to have known of its condition. *Id.*

13. *Defective sidewalk—personal injury—dangerous character of walk.* A reference in the instruction to the jury to the defect in the sidewalk as "the dangerous character of the walk," *held*, not to be deemed prejudicial, where, under the finding of the jury, the defect was of a dangerous character. *Id.*

14. *Robbery—force necessary.* The defendant was indicted for the crime of robbery by means of putting in fear one G., and taking with force and violence, while armed with a dangerous and deadly weapon, a jug containing whiskey from the person of said G. The evidence

INSTRUCTIONS TO JURY. CONSTRUED. *Continued.*

tended to show that, while the defendant and G. were riding together in a hack, with the jug of whiskey belonging to G. resting on the floor of the hack, near them, not secured in any manner, and while G.'s attention was diverted, and without any resistance from him, the defendant seized the jug, leaped with it from the hack, and ran back towards the town from whence the hack had come. The court refused to instruct the jury, at the request of the defendant, that "if, at the time the defendant took the jug, the said Graham was looking out of the hack at some other object, and did not have hold of it, and it was setting on the bottom of the hack, not attached to his person, and no other force or violence was used by the defendant than merely to take hold of the jug and carry it away without the knowledge of said Graham," this would not constitute the crime of robbery. *Held*, that the instruction should have been given. *State v. Miller, 291.*

15. *Offer of premiums by fair association—ratification.* The court instructed the jury that if the defendant had knowledge of the offer of premiums, and he, as a member of the association assisted in holding the fair, this would amount to a ratification of such offer, and would render the defendant liable; but that his acts at the fair, if any, as a mere employe would not of themselves, if he was not a member, impose any liability upon him. *Held*, that the instruction was correct. *Murray v. Walker, 202.*

16. *Consideration for agreement.* A rule of the association permitted the officers, in case of unfavorable weather, to reduce or scale down the premiums, and the court had instructed the jury that if the conditions were such that the officers might scale down the premiums the association would only be liable for the reduced amount. There was evidence of an offer on the part of the association to pay less than the full amount of the premiums, and of the acceptance by some of such offer. *Held*, that the court properly instructed the jury that no agreement of the exhibitors to accept a less sum than what was due, without other consideration than the payment of such less sum, would be binding. *Id.*

17. *Construction of railroad—damage to abutting property-owners.* An instruction that the abutting property-owner in the case is not entitled to recover damages which he or his tenants may have sustained, or will sustain by reason of any annoyance, inconvenience or loss suffered by them in common with the rest of the public, by reason of the construction and operation of a certain railroad track, *held* proper, the jury being also instructed that depreciation in the value of the plaintiff's property on such account would entitle him to recover. *Cook v. Chicago, M. & St. P. Ry. Co., 278.*

18. *Damages—facts pleaded in mitigation.* The jury were instructed that certain matter set forth in the instructions was pleaded by the defendant in mitigation of damages, and that, if established, it should

INSTRUCTIONS TO JURY. CONSTRUED. *Continued.*

be considered by them in estimating the damages to which the plaintiff was entitled. *Held*, that the jury must have understood that the matter in question was to be considered in mitigation of damages. *Blocker v. Schoff, 265.*

19. *Action on account stated—evasive answer—evidence.* Where to an action upon an account stated the defendant filed an evasive answer, which was not, in effect, a denial of the indebtedness alleged, nor of knowledge or information sufficient to form a belief, and set up a counterclaim for damages for the alleged wrongful suing out of an attachment, but when the cause was called for trial the defendants denied verbally an indebtedness to the plaintiff as alleged, and thereupon the court awarded to the plaintiff the right to open and close; and on the trial the defendants by their testimony admitted that the debit side of the account was correct, but an alleged admission of that part of the account was not proven, and the evidence as to the credit side of the account was conflicting, *held*, that the court should have instructed the jury that the debit side of the account was admitted, and that an instruction that the burden of proof was upon the plaintiff to establish their account by the weight of the evidence was erroneous. *Blaul & Sons v. Tharp & Co., 665.*

20. *Special verdict—harmony with general verdict.* An instruction to a jury that it should determine upon its answers to certain special interrogatories submitted to it in the same manner as upon its general verdict, and be careful that its answers be in harmony with and and support its general verdict, *held*, not to be deemed prejudicial where the general tenor of previous instructions was that the jury should decide the case upon the evidence, and it must have understood that its answers to the special interrogatories were to be determined in the same manner. *Capital City Bank v. Wakefield, 46.*

21. *Commission for sale of real estate—custom.* Where in an action by a broker for commission for the sale of real estate, mortgaged for nearly its full value, which mortgage the purchaser assumed, and conveyed to the grantor other real estate for the equity in the premises, the evidence was uniform as to the customary charges of agents for the sale of real estate, but was conflicting as to what sum should be the basis upon which to compute the commission, *held*, that under the circumstances the court properly instructed the jury that if they found a custom existed as to charges for such services it must be shown that the principal had knowledge of its existence. *Smith v. Hess, 238.*

SPECIAL FINDINGS. See Verdict, 6.

WHEN COURT MAY DIRECT VERDICT. See Practice and Procedure, 16, 17, 18.

INSURANCE (FIRE).

AGENTS.

1. *Insurer bound by acts of—representations of applicant.* Where an applicant for fire insurance truthfully answered all material inquiries in regard to the property he desired to have insured, but the agent of the insurer incorrectly recorded such answers in the written application, and the same was signed by the applicant without reading, and without knowledge that his answers had not been correctly recorded, *held*, that the insurer was bound by the acts of its agent, and that it could not escape liability upon the policy of insurance issued upon such application on account of the apparent mis-statements therein. *McComb v. Council Bluffs Ins. Co.*, *247*.

PREMIUM.

2. *Receipt of payment in policy—construction—estoppel.* A clause in a policy of insurance against fire acknowledging the receipt of payment of the premium thereon, but which was not paid in fact, and remained unpaid at the date of loss thereunder, will not estop the insurer from setting up such non-payment as a defense to an action upon such policy by a mortgagee, to whom the loss was made payable, and who had no notice of the non-payment of the premium, where it appears that the delivery of the policy to the insured was made by mail upon his express promise to remit the amount of the premium upon the receipt of the policy. *Union Building Association v. Rockford Ins. Co.*, *647*.

3. *Payment—notice of suspension of policy—service by mail.* Under section 2 of chapter 210 of the Laws of 1880, providing that, where the time for the payment of the premium upon a policy of insurance is fixed by note or other contract, the insurance company may, within thirty days before, or at any time after, the maturity of such obligation, serve the defendant with notice in writing that unless the same is paid within thirty days his policy will be suspended, and providing further that such notice may be served personally or by registered letter, addressed to the assured at his post-office address, the service of such notice by mail is completed when the letter is properly addressed to the insured, and registered at the post-office. *Ross v. Hawkeye Ins. Co.*, *586*.

CONSTRUCTION OF POLICY.

4. *Conditions—change of ownership—chattel mortgage.* A stipulation in a fire insurance policy upon personal property, that the policy should become void in the event of any change in the title, ownership or possession of the property insured, is not violated by the execution of a mortgage upon such property to one who had an insurable interest in the property at the time the policy was issued. *Taylor v. Merchants & Bankers' Ins. Co.*, *402*.

INSURANCE (FIRE). *Continued.*

ACTION ON POLICY.

5. *Action prematurely brought—abatement.* A provision in an insurance policy against fire, that in case of loss the amount thereof shall be payable within sixty days after notice and proofs of loss have been received at the office of the company, will not entitle the insured to commence an action on such policy before the expiration of ninety days after giving notice of the loss, as provided by section 3 of chapter 211 of the Acts of the Eighteenth General Assembly, and an action brought upon a policy before the expiration of such time may be abated by a motion in arrest of judgment. *Id.*

6. *Value of property—evidence—burden of proof.* The provisions of section 3, chapter 211, Acts of the Eighteenth General Assembly, that in any action upon a policy of insurance for the loss of any building insured "the amount stated in the policy shall be received as *prima facie* evidence of the insurable value of the property at the date of the policy," have no application to cases of the loss of personal property. *Joy, Wright & Hudson v. Security Fire Ins. Co., 12.*

7. *Value of property—evidence.* In an action upon an insurance policy to recover for the loss of personal property insured, proof of the price at which the owner offered to sell the property within two weeks preceding the fire is competent on behalf of the defendant as tending to show the market value of the property destroyed. *Id.*

PROCEEDS.

8. *Property exempt from execution—insurance on same.* Where personal property exempt from execution, under section 3072 of the Code, is destroyed by fire, the avails of an insurance policy upon such property are likewise exempt. *Reynolds v. Haines, 342.*

INSURANCE (LIFE).

MUTUAL BENEFIT ASSOCIATIONS.

1. *Contract—membership in two lodges—right of action.* The plaintiff's intestate was the holder of a certificate of membership in the Germania Lodge in the Ancient Order of United Workmen, in which the plaintiff was named as the beneficiary. A division occurring in the order on account of some requirements of the supreme lodge, with which the then existing grand lodge and the above-named local lodge refused to comply, another local lodge was organized at the intestate's place of residence, composed of members who adhered to the supreme lodge, and called the Evening Star Lodge, which became a member of the defendant grand lodge. The plaintiff's intestate united with the Evening Star Lodge, and subsequently he surrendered his certificate to the defendant, and a new certificate was issued to him. He also continued his membership, however, in the Germania Lodge, and after his death the plaintiff received from it the amount of insurance due on account of such membership. *Held*, that the

deceased having made a new contract with the defendant lodge after the division in the order, the plaintiff's right of recovery thereunder was not affected by the payment made to her by the disloyal lodge. *Warnebold v. Grand Lodge, 23.*

2. *Payment of dues—forfeiture—estoppel.* The deceased had become delinquent in the payment of his dues to the Evening Star Lodge, but no action was taken by the lodge suspending him from membership, and before his death these dues were paid. After his death the loss was reported, and an assessment made to pay the same, in which he was stated to be entitled to all the benefits of the order. *Held*, that notwithstanding by the constitution of the order the deceased was suspended from membership upon his default in the payment of dues without any action being taken thereon, the defendant was estopped by its action from claiming that the deceased was not a member in good standing at the time of his death. *Id.*

3. *Lodge resolution—notice.* After the deceased became a member of the local loyal lodge, but before the issue of the certificate in controversy, the defendant lodge passed a resolution providing that it would not pay the beneficiary of any member who was affiliating with or paying assessments or dues to the disloyal lodge, "unless such member shall sever all connection with such rebel grand lodge," etc. Notice of this resolution was served upon the deceased, but the resolution as set forth in the notice did not contain the clause above quoted, and the jury found specially that the deceased did not have knowledge of such provision at the time he surrendered his old certificate and received a new one from the defendant. *Held*, that the right of membership of the deceased was not forfeited by continuing his connection with the disloyal lodge. *Id.*

4. *Lodge resolution—evidence.* The defendant offered to show that a delegate from the Evening Star Lodge to the grand lodge at the time the above resolution was adopted made a verbal report of said resolution at a meeting of the former lodge. *Held*, that it appearing that the deceased was not present at such meeting the evidence was properly excluded. *Id.*

5. *Lodge resolution—instructions.* The court instructed the jury that to make said resolution binding upon the deceased it must be found that he knew and believed that he was thereby precluded from any affiliation with the disloyal lodge. *Held*, that in view of the evidence relied upon to show such knowledge the instructions were not improper. *Id.*

INTEREST.

USURY.

1. *Promissory note—place of payment.* Where a promissory note purported on its face to have been made in Iowa, but the evidence

INTEREST. USURY. *Continued.*

showed that it was in fact made and delivered in the state of New York, where the payee resided, *held*, that in the absence of evidence as to where the indebtedness for which the note was given was incurred, or where the consideration therefor was delivered, or of any agreement, as to the place of payment, it must be presumed to be payable in Iowa, and, being valid under the laws of that state, it would not be held void because the rate of interest provided therein is usurious under the laws of the state of New York. *Bigelow v. Burnham, 120.*

2. *Usury—evidence—defense—partnership.* Where the notes of a firm after a series of renewals were paid by one of the partners after notice from his copartner that the same were tainted with usury, and that he desired to make such defense to the collection thereof, *held*, that the plea of usury was not defeated by such payment, and that the usurious interest charged in the several series of notes should, in an accounting between the partners, be credited against the amount paid by the partner taking up said notes where the fact of usury was established. *Yetzer v. Applegate, 726.*

3. *Forfeiture—federal statutes — national banks — recovery.* The penalty provided for in federal statutes in the event of charges of usurious interest by national banks cannot be enforced by way of counterclaim set up by the defendant in a suit upon a promissory note. *First Nat. Bank v. Moore, 740.*

INTERROGATORIES.

SUBMITTED TO JURY. See Verdict, 6.

INTOXICATING LIQUORS.

CONSTITUTIONALITY OF STATUTES.

1. *Injunction—violation—fine.* Section 1543 of the Code as amended by section 12 of chapter 143 of the Acts of the Twentieth General Assembly, providing for a fine of five hundred dollars and imprisonment for the violation of an injunction against the sale of intoxicating liquors is not unconstitutional. *Utterson v. Conrad, 746.*

ILLEGAL SALES.

2. *Original packages—police regulations—replevin.* Where intoxicating liquors shipped from a foreign state into this state for sale in the original packages, prior to the enactment of the act of August 8, 1890, fifty-first congress (26 Stat. L. 313), were seized under a search warrant issued in pursuance of the police regulations of the state they could not be taken from the officer making the seizure under a writ of replevin. *Lemp v. Fullerton, 192.*

3. *Sale to minor—damages—lien upon real estate—knowledge of agent.* Where a lessee of real estate used the same for a saloon, which was open and notorious, and of so disorderly a character as to

INTOXICATING LIQUORS. ILLEGAL SALES. *Continued.*

attract ruffians, and a stabbing affray occurring therein was published in two daily papers of the town, and the husband of the owner of the premises collected the rents, and looked after the property for her, *held*, that the owner was chargeable with notice of the sale of intoxicating liquors upon said premises contrary to law, and that the plaintiff having recovered a judgment against the saloon keeper on account of the unlawful sale of liquors to a minor upon said premises, was entitled to have the same established as a lien upon said real estate. *Johnson v. Grimminger, 10.*

4. *Nuisance—injunction—lessor's liability.* Where property was leased for a lawful purpose, and the lessee used the same for the illegal sale of intoxicating liquors without the knowledge of the lessor, who, after the issuance of a temporary injunction against him because of said nuisance, notified the lessee to quit the premises, and afterwards, in good faith, prosecuted an action of forcible entry and detainer for the possession of the property, but was denied the relief sought, *held*, that upon the final hearing of the injunction proceedings the temporary injunction against the lessor was properly dissolved, and the action dismissed as to him, but that the nuisance should, nevertheless, have been abated by order of the court. *Morgan v. Koestner, 134.*

5. *Costs.* The owner of real estate is not liable for the costs of an action for the abatement of a saloon nuisance maintained upon his premises without his knowledge or consent. *Id.*

6. *Indictment—liquor nuisance—second conviction.* Where an indictment for the crime of nuisance, as defined in section 1543 of the Code, further charged that the defendant "was, on the twenty-sixth day of September, 1888, convicted of the crime of nuisance, in the district court of Marshall county, Iowa, *held*, that the indictment sufficiently alleged a former conviction of the same kind of nuisance as that for which he was then indicted; and that, by his plea of guilty, the defendant not only confessed himself as guilty of keeping a nuisance, as charged, but that he had formerly been convicted of keeping the same kind of nuisance, and warranted his commitment to the county jail, as provided by section 9, chapter 66, of the Acts of the Twenty-first General Assembly. *State v. Zimmerman, 118.*

JUDGMENT.

RENDERED ON MOTION.

1. *No conflict in evidence.* Where, in an action of replevin issue was joined as to the value of the property in question, but the evidence as to its value was without conflict, *held*, that the defendant being entitled to judgment upon the evidence, his motion to take the case from the jury and for judgment for the value of the property thus shown should have been sustained. *Lemp v. Fullerton, 192.*

JUDGMENT. *Continued*

BY CONFESSION.

2. *Sufficiency of statement.* The statement, that the plaintiff having signed as security for the defendant for more than two thousand dollars, and that the defendant afterwards becoming unable to pay the said plaintiff assumed and agreed to pay for and in behalf of the defendant a sum named, whereupon the defendant executed his certain promissory note in favor of the plaintiff, and delivered the same to him, in the sum aforesaid, and that said sum, including interest, is now justly due on said note, with said note attached thereto, properly identified, is sufficiently specific to warrant an entry of judgment by confession for the amount of said note and interest. ***Dullard v. Phelan, 471.***

3. *Taxation of attorney fee.* A judgment by confession is one entered without action, and such a judgment entered upon a promissory note providing for a "reasonable attorney's fee, if sued," will not authorize the taxation of an attorney's fee therein, either under said clause or the provisions of chapter 185 of Acts of the Eighteenth General Assembly. *Id.*

INTERPRETATION.

4. *Extrinsic evidence.* The lands in controversy were not described in the judgment above referred to, but it was decreed therein that the county of C., through whom the defendants in this action claim title, was estopped from impeaching the title of the plaintiff herein to the lands entered in the name of said county with the swamp land indemnity scrip; that it should convey said lands to the plaintiff, and should not impeach the validity of the contract in relation to said lands between said county and the plaintiff, dated December 12, 1861. To show that the decree applied to the lands in controversy the plaintiff offered in evidence an agreement which recited that it was made on December 12, 1861, but purported to have been signed December 18, 1861, and a deed which referred to the contract as of December, 1861. *Held*, that, in the absence of evidence that other contracts and deeds were made on the dates named, said instruments were sufficient to show that so much of the land in controversy as is swamp land was a part of that referred to in the above judgment. ***American Emigrant Co. v. Fuller, 599.***

5. *Extrinsic evidence.* The said decree recited that "This cause coming on for final hearing upon the stipulation of parties, it is ordered, adjudged," etc. *Held*, that said clause was to be construed to mean that the cause came on for final hearing at that time by stipulation of the parties, and not that the decree therein was rendered pursuant to such a stipulation. *Id.*

PERFORMANCE.

6. *Extension of time on appeal.* Where, in an action to redeem from a judicial sale, the plaintiff was awarded the right of redemption if made within ninety days after the rendering of the decree, but redemp-

JUDGMENT. PERFORMANCE. *Continued.*

tion within such time was prevented by the appeal of the defendant to the supreme court, *held*, that the plaintiff was entitled to ninety days after the affirmance of the judgment in the supreme court in which to redeem. *Schlawig v. De Peyster, 323.*

OPENING OF.

7. *Effect.* The lessor having been served with notice of said proceeding by publication only, her subsequent appearance to defend, as provided by section 2877 of the Code, *held* not to extend the time of said lessee's right of possession under said lease, pending the retrial, beyond the limit of time for redemption by said lessor as fixed by said judgment. *Stanbrough v. Cook, 705.*

JUDICIAL SALES.

REDEMPTION AFTER DEED ISSUED.

*Inadequacy of consideration.* Where, in an action against the occupants of a building, and one holding a legal title to the real estate, to abate the keeping of a saloon nuisance, judgment was rendered against the defendants for costs, including an attorney's fee, to the amount of thirty-one and fifty-hundredths dollars, and under a general execution issued thereon real estate of the value of ten thousand dollars was sold for the amount of said judgment to the attorney for the plaintiff, who thereafter assigned the certificate of sale to the sheriff executing said writ, to whom a deed afterwards issued, and it appeared that no lien was established by said decree against the land, *held*, in view of the inadequacy of the consideration, that one who took a conveyance of the property pending the injunction proceeding, and who was not a party to such proceeding, nor had actual notice thereof, and commenced an action to set aside said sale and deed within a few days after said sale was made was properly allowed to redeem said property upon the payment of the judgment and costs down to the time execution issued. *Lehner v. Loomis, 416.*

JURISDICTION.

OF COURTS IN PARTICULAR CASES.

1. *Appointment of commission to fix boundaries.* Under the provisions of section 2 of chapter 8 of the Acts of the Fifteenth General Assembly, providing for the appointment of a commission of one or more surveyors to make a survey of and permanently establish corners and boundaries of land in this state, where the same are lost or are in dispute, the district court has jurisdiction, upon the application of one owning land within the county, to appoint such commission, where the adjacent tract of land to be affected lies in another county, and the line which it is sought to have changed is the boundary line between the two counties. *Tooman v. Hidlebaugh, 130.*

2. *Justice's court—continuance.* After the plaintiff had commenced this action of replevin and the plaintiff had appeared before the jus

JURISDICTION. OF COURTS IN PARTICULAR CASES. *Continued.*

tice who had issued the search warrant, and joined issue upon the question of his right to the liquors seized thereunder, the justice ordered, upon the motion of the defendant herein, that the case stand continued to a date over five months hence, until the district court could determine the rights of the parties under the writ of replevin. *Held*, that the right of the justice to make such order could not be determined in this case. *Lemp v. Fullerton, 192.*

SUBSTITUTED SERVICE.

3. *Original notice—residence—void judgment.* Where, in an action for the foreclosure of a mortgage, service of the original notice was made upon the defendant mortgagor by delivering a copy thereof to his wife at the place where she and the defendant's children resided in this state, but the mortgagor had about eighteen months previously gone to another state, intending to make his home there, and there engaged in business, built a house, shop and other buildings, voted at elections, sat upon juries and discharged other duties of a citizen, but did not remove his family there for several years, though continually intending to do so, and visited them in this state at long intervals, *held*, that a decree of foreclosure based upon such service was void for want of jurisdiction. *Schlawig v. De Peyster, 323.*

JURY.

MISCONDUCT OF.

1. *New trial—prejudice.* Where a juryman, during the trial of a cause, disputed with the plaintiff, as to the testimony given by him at a former period of the trial, and then in an offensive manner called for the reading of the reporter's notes of such testimony, and afterwards said juryman and another engaged in a controversy with the plaintiff's counsel concerning the proper construction of certain documentary evidence, and because of such conduct the court instructed the jury that the points in the testimony which were the subject of dispute were wholly immaterial, *held*, that while the conduct of the juryman was improper it could not be said in view of the instruction of the court that the plaintiff was prejudiced thereby. *Truman v. Bishop, 637.*

WITHDRAWAL OF PAPERS FROM JURY ROOM.

2. *Practice.* After the jury had retired to deliberate on their verdict, the court sent for the original notice, and, in the absence of the jury, received evidence of the person who served it as to the date of service, with a view to having the return thereon corrected, and then returned the notice to the jury. *Held*, that it not appearing that such corrected return was submitted to the jury, nor that their verdict was in any manner influenced by such proceedings, the action of the court was without prejudice to the defendant. *McComb v. Council Bluffs Ins. Co., 247.*

JUSTICES OF THE PEACE.

APPEAL.

*Amount in controversy—counterclaim—jurisdiction.* Where an action was brought before a justice of the peace to recover five dollars and fifty cents, and the defendant filed a counterclaim praying judgment against the plaintiff in the sum of fifty dollars, to which the plaintiff filed a general denial, and the case resulted in judgment for the plaintiff in the sum of four dollars and ninety cents, from which the defendant appealed, *held*, that if, in the judgment of the district court, the counterclaim showed upon its face that the defendants were not entitled to the relief demanded, a motion by the plaintiff to dismiss the appeal because the controversy involved a sum less than twenty-five dollars should have been sustained. *Campbell v. Lewis Bros. & Menzer, 583.*

JURISDICTION OF. See Jurisdiction, 2.

LANDLORD AND TENANT.

LIEN FOR RENT.

1. *Crops—innocent purchaser—estoppel.* Where a landlord having a lien for the rent of farm lands upon crops grown upon the premises permitted the crops to be harvested and carried to market, and there sold to a purchaser without notice of his lien, in reliance upon the tenant paying him the rent out of the proceeds, *held*, that the landlord was estopped from asserting any claim to the crop sold as against such purchaser. *Wright v. Dickey Co., 464.*

ATTACHMENT FOR RENT.

2. *Conversion—use of property pending attachment proceedings.* Where under a landlord's attachment a sheriff levied upon the furniture and effects of the lessees of a hotel building, and, instead of removing said property, took a receipt therefor of one D, who, as agent for the owner of the hotel, kept the same open, and used the attached property for about sixty days, when it was sold under the attachment, *held*, that in the absence of evidence of any damage to the furniture by reason of its use pending the attachment proceedings, and it appearing that its removal from the hotel would have been attended with great expense, and with damage to the property, a judgment against the sheriff and the agent D., for the conversion of the attached property was erroneous. *Etter v. O'Neil, 655.*

AUTHORITY TO LEASE.

3. *Estoppel.* One who, as agent, has leased lands to another for a term of years will not be heard upon his subsequently acquiring title to the demised premises to claim that said lease was made without authority, and that such fact was known to the lessee. *Lee v. Lee, 565.*

ALTERATION OF LEASE BY LESSEE.

4. *Effect.* Where a lease of lands is made to commence at a future date by one already in possession thereof, the subsequent alteration

LANDLORD AND TENANT. ALTERATION OF LEASE BY LESSEE. *Continued.*

by the lessee of certain dates in said lease, referring to the time when the lease was made, will not affect the lessee's right to the possession of said premises. *Id.*

EJECTMENT.

5. *When action will lie.* Where one has come rightfully into the possession of leased premises, an action will not lie against him to recover possession until his right of possession has been terminated in the manner provided by law. *Id.*

LEASE OF LAND PENDING LITIGATION.

6. *Constructive notice—rights of lessee.* Under a lease of lands taken pending proceedings to foreclose the lessor's equity of redemption in the leased premises, the lessee will hold said premises subject to the rights of the plaintiff in said proceedings, and will be bound by the judgment rendered therein although not made a party thereto. *Stanbrough v. Cook, 705.*

7. *Effect of opening judgment as to lessor.* The lessor having been served with notice of said proceeding by publication only, her subsequent appearance to defend, as provided by section 2877 of the Code, *held* not to extend the time of said lessee's right of possession under said lease, pending the retrial, beyond the limit of time for redemption by said lessor as fixed by said judgment. *Id.*

8. *Conversion of crops by lessee—liability to grantee under sheriff's deed.* A lessee of lands under a lease as above described is not entitled to the protection of the provisions of section 3264 of the Code as against an action to recover damages for the wrongful conversion of pasturage and crops raised upon the demised premises after the execution and delivery of a sheriff's deed to the plaintiff in said foreclosure proceeding. *Id*

LIENS.

NOTICE OF. See Notice, 4.

LIMITATION OF ACTIONS.

COMMENCEMENT OF ACTION.

1. *Construction of statute.* In an action upon a promissory note properly commenced in a county other than that in which the defendant resides, as in the county where the note is by its terms made payable, the delivery of an original notice to the sheriff of such county, with the intention that it be served immediately, will be sufficient to stop the running of the statute of limitation as to said action, although the service of such notice was made upon the defendant in the county of his residence, after the action had become barred. *Bracken v. McAlvey, 421.*

LIMITATION OF ACTIONS. COMMENCEMENT OF ACTION. *Continued.*

2. *Filing of claim against estate of decedent—acts of administrator.* Where a claim was filed in proper form against the estate of a decedent, of which no notice was served upon the administrator, but upon which a partial payment was made by the administrator, and an offer made for the payment of the balance in real estate, and which in a petition for the sale of real estate was reported by the administrator to the court as a valid claim against the estate, *held*, that the filing of the claim was the commencement of proceedings for its allowance, and stopped the running of the statute of limitation; and that the defendant was estopped by his acts from setting up the statute, because no notice was served as provided by section 2408 of the Code. *Wilson v. McElroy, 293.*

PERIOD OF LIMITATION IN PARTICULAR CASES.

3. *Officers.* An action on behalf of the state or county to recover such sum of the sheriff for the benefit of the school fund will be barred in three years if the money was received by the defendant in the capacity of sheriff; or if paid to him as a private person, under agreement to hold it for the benefit of the state and county, it would be barred in five years. *State v. Farrell, 661.*

4. *Trusts—misappropriation of trust funds.* Where a guardian purchased real estate in her own name with money belonging to her ward, after the latter became of age, *held*, that such use of the ward's money by the guardian amounted to an appropriation thereof to her own use, for which a cause of action at once arose in favor of the ward, but that, after such right of action had become barred by the statute of limitations, the ward was not entitled to assert her ownership to said property against the heirs of the guardian. *Potter v. Douglass, 190.*

5. *Accounting—laches.* Where a ward delayed for more than twenty years after attaining her majority to ask an accounting with her guardian, and the evidence showed that the latter had made a settlement with the court, though the record thereof was informal, *held*, that the ward's action for an accounting was barred by the statute of limitations. *Heath v. Elliott, 357.*

6. *Tax titles—redemption—laches—estoppel.* Where the owner of real estate, knowing that the taxes for which the same had been sold at tax sale were illegal, remained silent as to such fact for nearly twenty years, while the holder of the tax deed under such sale, and his grantees, paid the taxes on said real estate, occupied and improved it, and made no adverse claim to the property, and, by reason of his laches it has become doubtful whether those claiming under the tax sale can produce the evidence which is necessary to a fair presentation of the case on their part, the right of redemption of such owner, and of those claiming under him with knowledge of the above facts, will be deemed barred in equity, and they will be estopped from

LIMITATION OF ACTIONS. PERIOD OF LIMITATION IN PARTICULAR CASES. *Continued.*

asserting any claim to said property adverse to the title based upon such tax sale. *Mathews v. Culbertson, 434.*

7. *Tax title—fraud of agent.* Where an agent, having money of his principal in his hands for the payment of taxes upon lands which were the subject of his agency, permitted the same to be sold for taxes, and afterwards took an assignment of the certificate of sale, and in due course of time received a tax deed thereto, *held,* that the fraud of the agent was not such as would arrest the running of the statute of limitations, and that an action commenced more than five years after the execution of the tax deed was barred under the provisions of section 902 of the Code. *Waggoner v. Mann, 17.*

8. *Laches—adverse possession.* Nearly thirty years after the order of sale the widow and children of the deceased, who had continuously during all that time been residents of Massachusetts, commenced this action to quiet their title to certain real estate, offering to make payment of the money paid to the administrator for the land, together with all legal taxes and interest. It was then about twenty-six years after the administrator's deed to said land had been recorded, and about ten years after the youngest heir became of age. During all that time the widow had known that her husband died seized of said land, and of the above proceedings and sale, and the same facts were known to the children for many years prior to the commencement of this suit, but no claim of ownership was ever made by any of them until solicited to give a quitclaim deed a short time before the commencement of this action. *Held,* that the plaintiffs were guilty of laches in not sooner asserting their rights in the land, and that they were now barred and estopped from claiming title thereto. *Bacon v. Chase, 521.*

9. *Laches—adverse possession.* The adverse title of the defendants being of record, *held,* that the fact that during the time when the land in question was used as a farm a forty-acre tract of low land was not cultivated, and that after the land was platted into town lots only a few thereof had been occupied up to the commencement of this action, would not excuse the laches of the plaintiff, nor prevent the running of the statute of limitations. *Id.*

10. *Contracts—subscription to corporate stock payable in installments.* Under a contract of subscription to stock in a corporation providing for payment of the same in installments "as the directors from time to time may order," if the authority of the board of directors be not exercised for more than ten years, the right of action for such installments will be deemed barred by the statute of limitations. *Great Western Tel. Co. v. Purdy, 431.*

11. *Bar not avoided as to one not party to action.* Several years preceding the commencement of this action, in proceedings instituted for

LIMITATION OF ACTIONS. PERIOD OF LIMITATION IN PARTICULAR CASES. *Continued.*

the appointment of a receiver of the plaintiff company, and in which the latter was a defendant, an order of court was made requiring assessments to be made upon the stockholders for the amount of their unpaid subscriptions to stock. *Held*, that the defendant not being a party to that proceeding, he was not bound thereby, and said order did not operate to stop the running of the statute. *Id.*

12. *Quieting title—swamp lands—adverse possession.* The lands in controversy were returned to the general land-office as swamp lands under the swamp-land act of congress of 1850, but in 1858 the secretary of the interior certified the land as being a part of a grant to aid in building a railroad from Dubuque to Sioux City; said grant being made subject, however, to all prior sales or other disposition within its limits. The land was never in the actual occupation of anyone prior to the commencement of this action. *Held*, that the fee-simple title to the land passed to the state by virtue of said act of congress of 1850, and to the county by the act of the general assembly of 1853, and the legal possession thereunder never having been disturbed by the defendant nor its grantors this action was not barred by the statute of limitations. *American Emigrant Co. v. Fuller, 599.*

13. *Laches—abandonment of title.* No patent was ever issued transferring the lands in question to the state, but the character of the land was readily ascertainable by anyone, the records of the county showed a conveyance of it to the plaintiff, and the judgment referred to was rendered only five years prior to the commencement of this action. *Held*, that the absence of any public action on the part of the plaintiff in relation to said land for five years preceding this action was not sufficient to create a presumption of abandonment of title by the plaintiff, nor that it had acquiesced in the adverse title of the defendant. *Id.*

14. *Limitation of actions—non-residents—evidence.* In an action for damages for the breach of a covenant of warranty in a deed for lands commenced more than ten years after the execution of the deed, the defendant, who was a non-resident, sought to show that the action was barred because he had for the period of ten years maintained an agency in the county wherein the lands were situated, and offered evidence tending to show that he had kept an office in such county for the purpose of transacting a land business during the time specified, and that a person named had acted as clerk in charge of the office. Books of record, which were claimed to have been brought from that office, and which showed transactions in regard to the lands in controversy, were offered in evidence, but were not identified as being the record of an office or agency kept by the defendant, and were, therefore, rejected. Furthermore, it did not appear that the purchase of the land in question was a transaction growing out of the business of that

LIMITATION OF ACTIONS. PERIOD OF LIMITATION IN PARTICULAR CASES. *Continued.*

office. *Held*, that the jury was authorized in finding that the defendant did not have an office or agency in the county wherein the lands were situated within the meaning of section 2613 of the Code. *Bellows v. Litchfield, 36.*

LIS PENDENS.

RIGHTS OF LESSEE.

*Lease of lands pending litigation—constructive notice.* Under a lease of lands taken pending proceedings to foreclose the lessor's equity of redemption in the leased premises, the lessee will hold said premises subject to the rights of the plaintiff in said proceeding, and will be bound by the judgment rendered therein although not made a party thereto. *Stanbrough v. Cook, 705.*

MANDAMUS.

TO ENFORCE DECREE AGAINST RAILROAD COMPANY. See Railroads, 5, 6.

MASTER AND SERVANT.

MASTER'S DUTY TO EMPLOYES.

1. *Railroads—roadways—duty to employes.* It is the duty of a railroad company to use ordinary care and supervision to keep its roadway in a good and safe condition for the operation of its trains by its employes, to the end that its employes may not be exposed to unnecessary hazards in such employment. *McKee v. Chicago, R. I. & P. Ry. Co., 616.*

2. *Decree of care required.* A brakeman on a freight train, observing that stones were being thrown from the track under one of the defendant's cars, went forward from the caboose, and climbed down the ladder on the side of said car, and while hanging low on the ladder, and looking under the car, with his back toward the locomotive, his head came in contact with a wing fence at the end of a cattle-guard, and he was instantly killed. The evidence showed that the stones which attracted the attention of the decedent were thrown out by a brakebeam, which was down and dragging; that in operating trains it sometimes happens that a brakebeam, or other appurtenance of the trucks of a car, gets out of order, and that it is the duty of the brakeman who discovers it to report the fact to the conductor, and under his direction to ascertain what, if anything, requires attention, and, if necessary, to stop the train; that to make the required examination it may be proper for the brakeman to descend the ladder at the end or on the side of the car, and look under it while the train is in motion. It did not appear, however, that such an event was of common occurrence, nor that any accident caused by the location of a wing fence had ever happened on the road of the defendant, although its road had been operated many years. *Held*, that conceding that the fence

MASTER AND SERVANT. MASTER'S DUTY TO EMPLOYES. *Continued.*

could, with reasonable care, have been so constructed that the decedent would have passed the same without injury, yet the accident was so improbable, and was due to causes of such rare occurrence, that the defendant, in the exercise of reasonable diligence, was not required to provide against it. *Id.*

USE OF DEFECTIVE APPLIANCE BY EMPLOYE.

3. *Contributory negligence*. The decedent, having been employed as brakeman on the division of the road on which the accident occurred, for about three years, with his runs usually in daylight, and it appearing that there were about four hundred wing fences on such division, substantially like that in question as to plan of construction, and the distance thereof from the track; and it further appearing that the side ladders of a car could be used with safety in examining the condition of trains while passing said wing fences, but that it was apparent to anyone who had observed the width of the spaces between the fences and the passing cars, that a person could not safely swing out from a car while passing such a fence, on its level, more than two feet, *held*, that the decedent must be presumed to have known, from his opportunity to have acquired such knowledge, that the distance between the fence in question and a passing car made it unsafe for one to swing out more than two feet from the car, as he did, and that in exposing himself unnecessarily to such danger, the decedent was guilty of contributory negligence. [BECK, C. J., *dissenting*.] *Id.*

NEGLIGENCE. See Negligence, 15.

MECHANICS' LIEN.

PROPERTY LIABLE TO.

*Ostensible owner—construction of statute—foreclosure.* One holding a power of attorney to buy and sell real estate for another, and until the sale thereof to rent the same, or to occupy continuously himself, and to hold the same in all respects as if he was the absolute owner thereof, is an *owner* within the meaning of section 10, chapter 100, of the Laws of the Sixteenth General Assembly; and where such a person purchased a town lot, and took a deed in the name of his principal, but such deed was not recorded, and material was sold to the agent for the construction of a house thereon, under the representation that he was building the same to occupy himself, and he did afterwards so occupy it, and was supposed by the furnisher of the material to be the owner, *held*, that the party supplying said materials was entitled to a mechanic's lien therefor, and to have the same foreclosed against said property as against the actual owner thereof. *Knapp v. Greenwood, 1.*

MERGER.

OF MORTGAGE LIEN IN LEGAL TITLE.

*Payment—assignment.* Where one in consideration of a conveyance of real estate assumed the payment of a mortgage thereon, and after-

MERGER. OF MORTGAGE LIEN IN LEGAL TITLE. *Continued.*

wards upon making payment of the mortgage indebtedness took an assignment of the mortgage to himself, *held*, that the lien of the mortgage was merged in the legal title, and that a judgment against the mortgagor, rendered subsequent to the mortgage, was a superior lien to that of the mortgage in the hands of such assignee. *Fouche v. Delk, 297.*

MISTAKE.

OF LAW.

1. *Mistake as to title—payment of taxes—estoppel.* For twenty-two years prior to the time that the plaintiff acquired his title from the county, the defendant's grantor paid the taxes upon the land in controversy under the belief that it held the title thereto, but the land during such period in fact belonged to the county, and was exempt from taxation. *Held*, that the plaintiff as the grantee of the county was not estopped from denying the defendant's title, nor was the plaintiff liable for the taxes so paid. *Hays v. McCormick, 89.*

2. *Taxes—payment by mistake—reimbursement.* The plaintiff not having been relieved of any burden devolving upon him by the payment of the taxes above indicated, *held*, that he could not be required to reimburse the defendant therefor as a condition to having his title quieted. *Id.*

OF FACT.

3. *Recovery of money paid by mistake.* C. having paid interest upon the amount of his note and mortgage to K. under the mistaken belief that the latter had paid such amount to S. in satisfaction of the mortgage held by him, *held*, that C. was entitled to recover of K. the amount of interest so paid. *Security Co. v. Kent, 30.*

MORTGAGES OF PERSONAL PROPERTY.

WHAT MAY BE MORTGAGED.

1. *Money demands not yet earned.* Demands for money not yet earned may be mortgaged. *Sandwich Mfg. Co. v. Robinson, 567.*

DESCRIPTION OF PROPERTY.

2. *Sufficiency of description.* A mortgage upon all threshing machine accounts, which the mortgagor shall earn or shall become due him by the work of a certain machine therein described, and in the mortgagor's possession, from the date of said mortgage until the mortgage indebtedness is paid in full, is too indefinite in its description to charge third persons with notice. [BECK, C. J., *dissenting.*] *Id.*

RIGHT OF POSSESSION.

3. *As against attaching creditors.* After acquiring title to a chattel mortgage the plaintiffs caused execution to issue upon a judgment

held by them against the mortgagor, and had the same levied upon the mortgaged property. Afterwards they served notice of their ownership of said property under said mortgage, and demanded the possession thereof, and its release from levies of execution and attachment in favor of certain other creditors of the mortgagor. *Held*, that the plaintiffs were entitled to the possession of said property by virtue of said mortgage, but that their demand upon the sheriff for possession operated as an abandonment of their levy upon the property under said execution, and left the property freed from all the writs in the sheriff's hands. *Blotcky Bros. v. O'Neill, 374.*

VALIDITY AS TO THIRD PARTIES.

4. *Mortgage on growing crops—sale—purchaser charged with notice after harvest.* The record of a mortgage upon crops to be raised by a person named upon certain described premises is notice of such lien upon said property after the crops have been harvested and carried to market, as against a purchaser of the same upon the market in good faith. *Wright v. Dickey Co., 332.*

5. *Uncertainty of description—notice—evidence.* A chattel mortgage which is void for uncertainty in the description of the property it is intended to cover may yet be introduced in evidence as against an execution creditor who has seized the mortgaged property, where assurance is given that the evidence will be followed with proof of actual notice of the mortgage by the execution creditor prior to making the levy. *Ordway v. Kittle, 752.*

6. *Power of one partner to execute on firm property to creditor.* Where one member of a firm, without the knowledge or consent of his copartner, executed a chattel mortgage upon a part only of the property of the firm to secure a partnership indebtedness, and such action was afterwards acquiesced in by the other partner, the latter claiming, and having previously exercised, the same authority, and the chattel mortgagee soon afterwards took possession of the mortgaged property, and proceeded to dispose of the same and to apply the proceeds upon the indebtedness secured by such mortgage, *held*, that the mortgage was valid as against a subsequent attaching creditor of the firm. *Letts, Fletcher & Co. v. McMaster & Dryden, 446.*

7. *Failure of mortgagee to take possession of portion of property.* A part of the property included in a certain mortgage consisted of forty hogs, which had been purchased by one D. with money borrowed of C. and L. for that purpose, under an agreement that they were to be shipped to Sioux City, sold, and the profits divided between said D. and the defendant firm. The hogs having sold for sufficient only to pay the loan, the entire proceeds were paid to C. and L. *Held*, that the mortgagees were not accountable for the value of the hogs, and their action was no evidence of fraud. *Id.*

MORTGAGES OF PERSONAL PROPERTY. VALIDITY AS TO THIRD PARTIES. *Continued.*

8. *Secret lien—effect on subsequent conveyance.* Some time before the execution of a mortgage the mortgagee had received a mortgage upon the firm's property to secure a part of the same indebtedness, but the same was never recorded, and when the mortgage in question was accepted the indebtedness under the former mortgage was included therein, and that mortgage surrendered. *Held*, that as the mortgagees were claiming nothing by virtue of the former mortgage the secret character of that lien could not affect the validity of the mortgage last executed. *Id.*

VALIDITY AS RELATING TO GENERAL ASSIGNMENTS. See Assignment for Benefit of Creditors, 1, 2, 3, 4.

ATTACHMENT.

9. *Levy on mortgaged chattels—tender to mortgagee.* A tender to the mortgagee of the amount due under a chattel mortgage, or the deposit of such sum with the clerk of the district court, by an attachment or execution creditor after the levy of his attachment or execution upon the mortgaged chattels, will not make such levy valid. *Blotcky Bros. v. O'Neill, 574.*

PRIORITY OF LIENS. See Sales, 2.

MORTGAGES OF REAL ESTATE.

CONSIDERATION.

1. *Fraud of agent.* Where C., having land mortgaged to S., employed a loan agent to negotiate for him another mortgage upon the same land with which to pay off the former mortgage indebtedness, and said loan agent took from C. his note and mortgage for the required sum payable to the order of K., and promised to pay the money received thereon to the satisfaction of the mortgage to S., and the note and mortgage given by C. were accepted by K. under the belief that certain moneys collected by the loan agent for him had been paid to C., but the money was not so paid, nor was it applied upon the mortgage to S., and had in fact been converted by said agent to his own use before the execution of C.'s note and mortgage to K., *held*, that the note and mortgage to K. were void for want of consideration. *Security Co. v. Kent, 30.*

2. *Recovery of money paid by mistake.* C. having paid interest upon the amount of his note and mortgage to K. under the mistaken belief that the latter had paid such amount to S. in satisfaction of the mortgage held by him, *held*, that C. was entitled to recover of K. the amount of interest so paid. *Id.*

MORTGAGES OF REAL ESTATE. *Continued.*

MERGER.

3. *Payment—assignment.* Where one in consideration of a conveyance of real estate assumed the payment of a mortgage thereon, and afterwards upon making payment of the mortgage indebtedness took an assignment of the mortgage to himself, *held*, that the lien of the mortgage was merged in the legal title, and that a judgment against the mortgagor, rendered subsequent to the mortgage, was a superior lien to that of the mortgage in the hands of such assignee. *Fouche v. Delk, 297.*

4. *Assumption by subsequent grantee—payment—subrogation.* Where one purchases real estate subject to a mortgage, which he assumes and agrees to pay as part of the consideration for said property, he will not be entitled upon the payment of said mortgage to be subrogated to the rights of the mortgagee, and enforce the same against a purchaser of the property at foreclosure sale under a second mortgage. *Kellogg v. Colby, 513.*

FORECLOSURE.

5. *Redemption—right of possession.* An adjudication entitling persons interested in real estate to redeem from a foreclosure sale thereof after the expiration of the statutory period for redemption will not entitle such persons, nor those claiming under them, to the possession of such property during the extension of time for redemption, and after the delivery of a sheriff's deed under said sale. *Stanbrough v. Cook, 705.*

See Lis Pendens.

MUNICIPAL CORPORATIONS.

POWERS.

*Nuisances—fines.* A city or incorporated town has no authority to provide by ordinance for the punishment by fine of persons guilty of the crime of nuisance. *City of Knoxville v. Chicago, B. & Q. Ry. Co., 636.*

NEGLIGENCE.

PROXIMATE CAUSE.

1. *Personal injury—defective bridge.* While the plaintiff was riding in a sleigh across a bridge, maintained by the defendant, her horse suddenly fell dead against the railing at the side of the bridge, which gave away, and caused the horse to fall over the side to the ground below, carrying the sleigh and plaintiff with him. The bridge was but twelve feet wide, and the railings were two and one-half feet high. The evidence showed that the horse fell either from disease or because he was improperly harnessed and driven. *Held*, that conceding that if the railing of the bridge had been of sufficient height and strength to

NEGLIGENCE. PROXIMATE CAUSE. *Continued.*

bear the weight of the horse the accident would not have happened, the condition of the railing and the narrowness of the bridge were not the proximate cause of the plaintiff's injuries. *McClain v. Garden Grove, 235.*

RAILROADS—DUTY TO EMPLOYES.

2. *Railroads—roadways.* It is the duty of a railroad company to use ordinary care and supervision to keep its roadway in a good and safe condition for the operation of its trains by its employes, to the end that its employes may not be exposed to unnecessary hazards in such employment. *McKee v. Chicago, R. I. & P. Ry. Co., 616.*

3. *Degree of care required.* A brakeman on a freight train, observing that stones were being thrown from the track under one of the defendant's cars, went forward from the caboose, and climbed down the ladder on the side of said car, and while hanging low on the ladder, and looking under the car, with his back toward the locomotive, his head came in contact with a wing fence at the end of a cattle-guard, and he was instantly killed. The evidence showed that the stones which attracted the attention of the decedent were thrown out by a brakebeam, which was down and dragging; that in operating trains it sometimes happens that a brakebeam, or other appurtenance of the trucks of a car, gets out of order, and that it is the duty of the brakeman who discovers it to report the fact to the conductor, and under his direction to ascertain what, if anything, requires attention, and, if necessary, to stop the train; that to make the required examination it may be proper for the brakeman to descend the ladder at the end or on the side of the car, and look under it while e train is in motion. It did not appear, however, that such an event was of common occurrence, nor that any accident caused by the location of a wing fence had ever happened on the road of the defendant, although its road had been operated many years. *Held,* that conceding that the fence could, with reasonable care, have been so constructed that the decedent would have passed the same without injury, yet the accident was so improbable, and was due to causes of such rare occurrence, that the defendant, in the exercise of reasonable diligence, was not required to provide against it. *Id.*

CONTRIBUTORY NEGLIGENCE.

4. *Personal injury—omission to instruct jury.* Where in an action for damages for personal injuries sustained through the negligence of a railway company, no instructions were asked or given to the jury concerning the rules of contributory negligence as affecting the plaintiff's right to recover, but the petition alleged the exercise of care on the part of the plaintiff, and it clearly appeared from the evidence that the defendant was negligent, and that the plaintiff was free from negligence, *held,* that the omission in the instructions was without prejudice to the defendant. *Flanagan v. Baltimore & O. Ry. Co., 639.*

NEGLIGENCE. CONTRIBUTORY NEGLIGENCE. *Continued.*

5. *Defective sidewalk—personal injury—instructions to jury.* In its instruction with reference to the plaintiff's freedom from negligence, the court directed the jury to take into consideration "the defective condition of the walk at and prior to the time of the injury," as alleged in the plaintiff's petition, her knowledge thereof, and her ability to walk thereon. *Held*, that it not being the purpose of such instruction to inform the jury as to the defendant's negligence, but that of the plaintiff, the language was not prejudicial when construed with the other instructions given. *Munger v. City of Waterloo, 559.*

6. *Railroads—custom—personal injury.* The plaintiff as custodian of the defendant's oil house had to place the switch lights on the stands every evening, and collect them for cleaning and filling every morning. While engaged in collecting the lamps one morning, and, while walking between two of the defendant's tracks, the plaintiff saw a mail and express car pushed by a switch engine coming toward him on the main track, and stepped onto a sidetrack and turned with his back to the approaching car to give warning to one S. that a man with a team was on the crossing. Before he had turned facing the car again the car had been "kicked" by the engine onto the sidetrack, and the same struck the plaintiff while in the act of taking a lamp from the switch stand, and injured him. The evidence showed that the car in question was regularly taken from the sidetrack every morning and pushed back to a train on the main track, and that the car had never been known to be pushed back onto the sidetrack after it had been pulled out. *Held*, that the plaintiff was guilty of contributory negligence, and was not, therefore, entitled to recover damages of the defendant for the injuries sustained. *Collins v. Burlington, C. R. & N. Ry. Co., 346.*

7. *Railroads—custom—personal injury—justification.* One who turns his back to a moving train, while standing on a railway track, merely to satisfy his curiosity, will not be justified in relying upon a custom as to the movement of trains, which, if observed, would have rendered his action safe. *Id.*

8. *Use of defective appliances by employe.* The decedent, having been employed as brakeman on the division of the road on which the accident occurred for about three years, with his runs usually in day light, and it appearing that there were about four hundred wing fences on such division substantially like that in question as to plan of construction, and the distance thereof from the track; and it further appearing that the side ladders of a car could be used with safety in examining the condition of trains while passing said wing fences, but that it was apparent to anyone who had observed the width of the spaces between the fences and the passing cars, that a person could not safely swing out from a car while passing such a fence, on its level, more than two feet, *held*, that the decedent must be presumed

NEGLIGENCE. CONTRIBUTORY NEGLIGENCE. *Continued.*

to have known, from his opportunity to have acquired such knowledge, that the distance between the fence in question and a passing car made it unsafe for one to swing out more than two feet from the car, as he did, and that in exposing himself unnecessarily to such danger the decedent was guilty of contributory negligence. [BECK, C. J., *dissenting.*] *McKee v. Chicago, R. I. & P. Ry. Co.*, 616.

9. *Railroads—construction of road—rules for employes.* A rule of a railroad company, designed for the guidance of its track repairers, that "they must see that no lumber, wood, stone, materials or tools are placed at any time within five feet of the rail," is not evidence that a cattle-guard fence built three feet and ten inches from the rail was improperly constructed. Neither is a rule requiring such employes to keep the fences and cattle-guards in good repair evidence of the negligence of a railroad company in permitting such a fence to stand too close to the track, when it is not claimed that the fence in question was out of repair. *Id.*

10. *Railroads—defective roadbed—death of engineer.* The evidence tended to show a faulty construction of the defendant's roadbed at the place of the accident; that many of the ties were in bad condition, and not suitable for use, and that the provision for the passage of water under the bridge was insufficient; that the deceased had not been informed of anything that required unusual care at the place of the accident, though he had been warned to guard against danger at two other places; that he seemed to have managed his engine with reasonable care; that before the place of the accident was reached the deceased had applied the airbrakes, but had released them when the level track, within a short distance of the bridge, was reached; that he was in his proper place, looking ahead, when the accident occurred, but a fog prevented him from seeing the ice on the track until too late to check the train, and avoid the collision in which he was killed. *Held*, that the jury were justified in returning a verdict against the defendant for damages for the death of the engineer. *Scagel v. Chicago, M. & St. P. Ry. Co.*, 380.

11. *Railroads—defective roadbed—death of engineer.* It appearing that when the defendant's section foreman examined the bridges a few hours before the accident the river was then rising rapidly, that the stream was accustomed to rise rapidly, and had been as high several times before since the defendant's railway had been constructed, and that twelve or fifteen years before the track at the same point had been washed out, *held*, that the finding of the jury that the defendant was guilty of the want of ordinary care in patrolling its track was supported by the evidence. *Id.*

EVIDENCE.

12. *Railroads—defective car—personal injury.* The only evidence that the car complained of by the plaintiff was defective was, that

NEGLIGENCE. EVIDENCE. *Continued.*

while the same was being moved by pushing the car ahead of an engine over the defendant's track it was derailed on a curve. On the other hand it appeared that the car was carefully examined by the defendant's car inspector the day before the accident, and by the car inspector and the foreman of the engine house the day after the accident, and found each time to be in perfect order. It further appeared that the truck used with the car in question was in general use in six states, and is used by many of the leading railroads of the country acceptably. *Held*, that a verdict for the plaintiff was not supported by the evidence. *O' Connor v. Illinois Cent. Ry. Co., 105.*

13. *Railroads—fire—presumptions—instructions to jury.* Proof of damage by fire, set by sparks from a railway company's engine, raises a presumption of negligence on the part of the company, which cannot be said, as a matter of law, to be overcome by proof that the engine in question was supplied with the best appliances to prevent the escape of fire, and was in good repair at the time, and that the same was not negligently handled. Under such circumstances, *held*, that the question of the company's negligence was properly left to the jury. *Greenfield v. Chicago & N. W. Ry. Co., 270.*

14. *Railroads—spreading of rails—instructions to jury.* The accident in which the plaintiff was injured having been caused by the spreading of the rails, the defendant asked two instructions to the effect that the fact that the switch at which the car left the track was not locked did not constitute negligence, if the purpose of the lock was not to prevent spreading of the rails. These instructions the court modified, by adding the words, "If the defendant used due care and diligence, as herein expressed, to otherwise fasten and secure the switch." *Held*, that as the verdict would have been for the defendant if the jury had found that the defendant had used due care to fasten and secure the switch, the modification of the instruction was without prejudice to the defendant. *Flanagan v. Baltimore & O. Ry. Co., 639.*

15. *Master and servant—personal injury—pleading—verdict.* The plaintiff was a bridge builder in the employ of the defendant, and at the time of receiving his injuries was engaged in assisting in the removal of a heavy timber, known as a chord, from a truss bridge to the ground by the aid of a pile driver and flat car. As the chord was raised from the bridge, the north end resting on the flat car while the south end extended beyond the rear of the car, and several feet higher than the north end, it swung against the leads of the pile driver, and became fast. While attempting to shove the chord from the frame the plaintiff's leg was struck by the chord, and broken. Upon the trial the plaintiff testified that the exhaust of the engine was running at this time, and that when running "everything worked by signs;" that he was standing at the south end of the car to keep out of the way of the chord until he got orders, when the foreman motioned to him, and shook his head at him as if he were

NEGLIGENCE. EVIDENCE. *Continued.*

standing there too long, but he could not hear what he said; that the foreman motioned to him to go across there (the witness illustrating with a forward movement with the hands), and that he went over and took hold of the chord, when there was a slack on the leads, and he was struck by the chord; that when the foreman made said signal to the plaintiff he was standing between the men holding the leads and the car on the track. The plaintiff further testified, "I did not know what he (the foreman) motioned at me for, but I went ahead there." The jury found specially that the foreman ordered the plaintiff by motion and gesture to go over to the east side of the car, and push the end of the chord resting on the car off onto the ground, and returned a general verdict in favor of the plaintiff. *Held*, that the special findings were not supported by the evidence, and that under the allegations of the petition charging the defendant with negligence in that the foreman directed the above action of the defendant by motions and gestures, the evidence did not warrant the conclusion of negligence against the company in ordering the plaintiff to the place where he was injured. *McCarthy v. Chicago, R. I. & P. Ry. Co., 485.*

16. *Municipal corporations—defective sidewalks—notice—personal injury.* In an action against a city for damages on account of injuries sustained through stepping in a hole in the sidewalk, the plaintiff was inquired of as to what was the condition of the sidewalk between her house and the corner, that being the place where the accident occurred, and she was permitted to answer that the walk was rickety, and had a number of holes in it. *Held*, that the testimony was competent as showing the general defective condition of the walk, which should have been known to the officers of the city, and, if known and repaired, would have included the defect in question. *Munger v. City of Waterloo, 559.*

17. *Municipal corporations—defective sidewalks—size of hole in walk.* The size of the hole into which the plaintiff stepped being in evidence, *held*, that evidence as to whether the hole was large enough lengthwise so that a person walking crosswise of the hole could have put his foot in it was properly excluded, as the question left the size of the foot entirely to inference. *Id.*

18. *Municipal corporations—defective sidewalks—condition after accident.* Evidence of the condition of the walk in such case two months after the accident may be properly admitted when it is shown that the walk was in a like bad condition since long prior to the date of the injury. *Id.*

INSTRUCTIONS TO JURY.

19. *Municipal corporations—defective sidewalk—knowledge of corporation.* The court having stated very minutely the facts upon which the plaintiff sought to recover, and instructed the jury that the plaintiff's recovery must depend upon such facts being sustained by

NEGLIGENCE. INSTRUCTIONS TO JURY. *Continued.*

the evidence, it was not erroneous to instruct the jury that if the walk had been "notoriously bad and out of repair," and if the city undertook to repair the "defective" walk, and left it in "an unsafe condition," it would be presumed to have known of its condition. *Id.*

20. *Municipal corporations—defective sidewalks.* A reference in the instructions to the jury to the defect in the sidewalk as "the dangerous character of the walk," *held*, not to be deemed prejudicial, where, under the finding of the jury, the defect was of a dangerous character. *Id.*

PLEADING.

21. *Master and servant—defective machinery—knowledge of employer.* In an action by an employe of a railroad company for damages for injuries sustained in being thrown from a freight car alleged to be so defectively constructed that it would not turn a curve, an allegation that the plaintiff's injury was caused wholly by the defendant's negligently using and permitting to be used the car so defectively constructed sufficiently charges negligence on the part of the defendant, although such negligence could only be proven by showing that the defendant had either actual or constructive knowledge of the defect. *O'Conner v. Ill. Cent. Ry. Co., 105.*

See Damages, Railroads, Master and Servant.

NEW TRIAL.

GROUNDS FOR.

1. *Newly discovered evidence.* A new trial will not be granted in a criminal case because of the affidavit of one of the witnesses for the prosecution that he was mistaken in his testimony given upon the trial, when such testimony was rebutted by witnesses testifying in behalf of the defendant, and does not pertain to a material issue in the case. *State v. Potts, 317.*

2. *Newly discovered evidence.* A new trial will not be granted upon the ground of newly discovered evidence when such evidence is merely cumulative, or is of such a nature as should have been discovered before or during the trial. *Stone v. Moore, 186.*

3. *Newly discovered evidence—construction of term "cumulative."* Where the newly discovered evidence for which a new trial is asked is of new facts or acts tending to favor an ultimate fact in issue, and is not merely additional proof of the same facts or acts of which evidence was offered on the trial in proof of such ultimate fact, it is not to be deemed cumulative within the rules pertaining to granting of new trials. *Boggess v. Read, 548.*

4. *Newly discovered evidence—showing of diligence.* As showing diligence to obtain such newly discovered evidence before the former trial the defendant alleged that before said trial he made inquiry of a

NEW TRIAL. GROUNDS FOR. *Continued.*

great many persons whom he supposed had knowledge, or who would be likely to have knowledge, of the matters in issue in said case, and in each and every instance pursued each and every line or hint of evidence with diligence, to the full extent of his ability. *Held*, that the application for new trial was not deficient in the showing of diligence because the names of the persons inquired of by the defendant were not set out. *Id.*

5. *Newly discovered evidence—action for slander—plea of justification.* Under the provisions of section 2837 of the Code, entitling a party to a new trial upon the ground of newly discovered evidence, without exception as to any class of cases, a defendant in an action for slander whose defense is a plea of justification may have a new trial upon the above ground. *Id.*

6. *Misconduct of jury—prejudice.* Where a juryman, during the trial of a cause, disputed with the plaintiff, as to the testimony given by him at a former period of the trial, and then, in an offensive manner, called for the reading of the reporter's notes of such testimony, and afterwards said juryman and another engaged in a controversy with the plaintiff's counsel concerning the proper construction of certain documentary evidence, and because of such conduct the court instructed the jury that the points in the testimony which were the subject of dispute were wholly immaterial, *held*, that while the conduct of the juryman was improper it could not be said in view of the instruction of the court that the plaintiff was prejudiced thereby. *Truman v. Bishop, 697.*

7. *Absence of defendant from trial.* The fact that in an action upon a promissory note the defendant was not present at the trial, without more, is not a ground for setting aside the judgment, and permitting a new trial. *Seiberling v. Schuster, 747.*

8. *Sufficiency of evidence to sustain verdict.* Where the verdict in a criminal cause appears to the supreme court to be against the clear weight of the evidence, the cause will be remanded for a new trial. *State v. Wise, 596.*

APPEAL FROM ORDER ON MOTION.

9. *Record—review.* Where, upon appeal from an order granting a new trial, the record does not disclose upon which of the several grounds stated in the motion therefor the order was based, the supreme court will affirm the action of the trial court, if, as to any one of said grounds, error does not affirmatively appear. *Wightman v. Butler Co., 691.*

10. *Record—conflict of evidence.* Where, in support of a motion for new trial upon the ground of the misconduct of one of the jury, an affidavit was filed to certain facts, which, if true, warranted the granting of a new trial, and the juryman in question made an affidavit specifically denying the charges made, *held*, that the evidence being conflicting the finding of the trial court was conclusive. *Id.*

NOTICE.

ACTUAL.

1. *Chattel mortgage—uncertainty of description.* Actual notice by an execution creditor that a mortgage is claimed upon certain property upon which the execution is levied will render a mortgage, otherwise void for uncertainty, valid as against such creditor. *Ordway v. Kittle, 752.*

CONSTRUCTIVE.

2. *Mortgage—sufficiency of description.* A mortgage upon all threshing machine accounts, which the mortgagor shall earn or shall become due him by the work of a certain machine therein described, and in the mortgagor's possession, from the date of said mortgage until the mortgage indebtedness is paid in full, is too indefinite in its description to charge third persons with notice. [BECK, C. J., *dissenting.*] *Sandwich Mfg. Co. v. Robinson, 567.*

3. *Effect—bona fide purchaser.* A purchaser of real estate, with constructive notice that the title thereto is based upon a tax title acquired by a trustee for one of several tenants in common, is not entitled to have his title protected against the right of the co-tenants to redeem, by reason of his being a remote *bona fide* purchaser for value. *Sorenson v. Davis, 405.*

4. *Mortgage on growing crops—sale—purchaser charged with notice after harvest.* The record of a mortgage upon crops to be raised by a person named upon certain described premises is notice of such lien upon said property after the crops have been harvested and carried to market, as against a purchaser of the same upon the market in good faith. *Wright v. Dickey Co., 332.*

See Real Property, 5.

OF RESCISSION OF CONTRACT.

5. *Sales of personal property—breach—remedy of vendor.* On the evening of November 26 the vendor telegraphed the vendee that he would hold the cattle until the next day subject to his order, and that if the same were not then received by the vendee he would take steps authorized by law to protect himself. *Held*, that, conceding such a notice was necessary, the vendor was not obliged to state what action he would take to indemnify himself against loss. *Ingram v. Wackernagel, 82.*

KNOWLEDGE OF AGENT.

6. *Sale of liquors to minor—damages—lien upon real estate.* Where a lessee of real estate used the same for a saloon, which was open and notorious, and of so disorderly a character as to attract ruffians, and a stabbing affray occurring therein was published in two daily papers of the town, and the husband of the owner of the premises collected the rents, and looked after the property for her, *held*, that

NOTICE. KNOWLEDGE OF. *Continued.*

the owner was chargeable with notice of the sale of intoxicating liquors upon said premises contrary to law, and that the plaintiff having recovered a judgment against the saloon keeper on account of the unlawful sale of liquors to a minor upon said premises was entitled to have the same established as a lien upon said real estate. *Johnson v. Grimminger, 10.*

SERVICE OF BY MAIL.

7. *Insurance—premium—payment—notice of suspension of policy.* Under section 2 of chapter 210 of the Laws of 1880, providing that, where the time for the payment of the premium upon a policy of insurance is fixed by note or other contract, the insurance company may, within thirty days before, or at any time after, the maturity of such obligation, serve the defendant with notice in writing that unless the same is paid within thirty days his policy will be suspended; and providing, further, that such notice may be served personally or by registered letter, addressed to the assured at his postoffice address, the service of such notice by mail is completed when the letter is properly addressed to the insured, and registered at the postoffice. *Ross v. Hawkeye Ins. Co., 586.*

WAIVER OF.

8. *Administrator's sale—jurisdiction of court.* Where about four years after the issuance of letters of administration in this state upon the estate of a deceased non-resident, during which time no claims had been filed against the estate, the administrator made application for permission to sell certain real estate, situated in the same county, for the payment of debts, and accompanying said application was a statement of account in favor of the administrator in a sum about equal to the value of said real estate, upon which was indorsed the statement, that said account was just and true, and that the goods and estate of the deceased in Iowa ought to be sold for the purpose of liquidating the same, which indorsement was signed by the administrator of the same estate in Massachusetts, and by the widow of the deceased, also a resident of said state, on behalf of herself and as guardian for her minor children, *held*, that the indorsement upon said account operated as a waiver of notice by the widow of the application to sell, and that the court having jurisdiction of the subject-matter a sale of said real estate in pursuance of an order of court upon said application was valid as against the widow. *Bacon v. Chase, 521.*

AS AFFECTING TITLE OF GRANTEES. See Sales, 2.

OF APPEAL. See Appeal, 1.

NUISANCE.

PUBLIC.

1. *Cities and towns—powers—fines.* A city or incorporated town has no authority to provide by ordinance for the punishment by fine

of persons guilty of the crime of nuisance. *City of Knoxville v. Chicago, B. & Q. Ry. Co., 636.*

PRIVATE.

2. *Damages—proof—instructions to jury.* Where, in an action to recover damages alleged to have been sustained through the operation of a smokestack and brick kiln by the defendant, the plaintiff averred several distinct elements of damage in her petition, *held*, that an instruction to the jury, that to entitle the plaintiff to recover she must prove each and every allegation of the petition, was erroneous. *Harley v. Merrill Brick Co., 73.*

3. *When of both public and private nature.* One may recover for damages sustained by a nuisance though the damage sustained by him be of the same character as that sustained by the public, if the private damage be distinct from that suffered by the public. *Id.*

4. *Liability of one of several contributors.* It appeared from the evidence that the plaintiff's dwelling was situated about six hundred feet from certain tile works, that a railway was operated in the vicinity, that large quantities of soft coal were burned in the city, and that the smoke from the tile works, from the railway locomotives, and perhaps from the city at large, contributed to the injuries of which the plaintiff complained. *Held*, that the trial court erroneously instructed the jury that to constitute the defendant's works a nuisance the operation of its works alone could be considered, and that the creation of a nuisance by the smoke, soot or gas given off by the defendant's works being combined with that given off by other industries, would not render the defendant liable in an action against it alone. The rule being that each person who acts in maintaining a nuisance is liable for the resulting damage; such liability, however, being limited to the results of his own action if he acts independently. *Id.*

5. *Estoppel—conduct not inducing action.* One's silence during the construction of a smokestack and brick kiln in the vicinity of his premises will not estop him from subsequently proceeding against the same as a nuisance, if the erection of such works was not induced thereby. *Id.*

6. *Private injury—evidence.* In such an action the existence of the alleged nuisance cannot be shown by evidence of the effect of the operation of the defendant's works upon people and property not in controversy. *Id.*

7. *Value of defendant's works as evidence.* Under the issue of estoppel, pleaded by the defendant, *held*, that evidence of the value of the defendant's works was properly admitted. *Id.*

OFFICERS.

POWERS.

1. *Executive council—designation of penitentiary.* Section 1, chapter 43, of the Acts of the Fourteenth General Assembly, and section 8, chapter 40, of the Acts of the Sixteenth General Assembly, establishing a penitentiary at Anamosa, and providing that such convicts shall be confined therein as may be designated by the executive council of the state, are not in conflict with section 1 of article 5 of the constitution of this state, vesting the judicial power of the state in a supreme and district courts. *O'Brien v. Barr, 51.*

2. *Executive council—designation of penitentiary.* Under the above statutes the executive council may order the removal from the penitentiary at Ft. Madison to that at Anamosa of all convicts of a class described, without naming the particular convicts so to be transferred, but leaving the selection of those falling within such class to be made by the warden. *Id.*

3. *Schools—directors—subdirectors—injunction.* A subdirector in a school district has no authority to refuse to use or to allow to be placed in his school an article ordered therefor by the board of directors, upon the ground that the same was purchased contrary to law, or because the same is worthless and a needless expense; and a subdirector so resisting the authority of the board may be restrained from so doing by injunction. *District Township of Union v. Meyers, 688.*

4. *Acceptance of orders—powers of officers of corporation.* The plaintiff having admitted in his testimony that his commissions were payable only when the orders obtained by him were accepted by the principal, which was a corporation, *held*, that a mere mental acceptance of orders by the president of the company would not render the principal liable for commissions upon orders which were of a character that the company was not bound to accept, and which were rejected by its officers when acting together. *Sanderson v. Tinkham Smoke-Consumer Co., 446.*

ACTION AGAINST.

5. *Statute of limitations.* An action on behalf of the state or county to recover any sum of the sheriff for the benefit of the school fund will be barred in three years if the money was received by the defendant in the capacity of sheriff, or, if paid to him as a private person, under agreement to hold it for the benefit of the state and county, it would be barred in five years. *State v. Farrell, 661.*

ORIGINAL NOTICE.

SUBSTITUTED SERVICE.

1. *Residence—void judgment.* Where, in an action for the foreclosure of a mortgage, service of the original notice was made upon the defendant mortgagor by delivering a copy thereof to his wife at the

ORIGINAL NOTICE. SUBSTITUTED SERVICE. *Continued.*

place where she and the defendant's children resided in this state, but the mortgagor had about eighteen months previously gone to another state, intending to make his home there, and there engaged in business, built a house, shop and other buildings, voted at elections, sat upon juries and discharged other duties of a citizen, but did not remove his family there for several years, though continually intending to do so, and visited them in this state at long intervals, *held*, that a decree of foreclosure based upon such service was void for want of jurisdiction. *Schlawig v. De Peyster, 323.*

RETURN.

2. *Parol evidence to contradict.* Where it appeared that the return of the officer upon an original notice had been altered, and that the return in fact made by him was not in existence, *held*, that it was competent to prove the date of the service of such notice by parol evidence. *McComb v. Council Bluffs Ins. Co., 247.*

COMMENCEMENT OF ACTION. See Action, 8.

PARTNERSHIP.

AUTHORITY OF PARTNER.

1. *Mortgage—power of one partner to execute on firm property to creditor.* Where one member of a firm, without the knowledge or consent of his copartner, executed a chattel mortgage upon a part only of the property of the firm to secure a partnership indebtedness, and such action was afterwards acquiesced in by the other partner, the latter claiming, and having previously exercised, the same authority, and the chattel mortgagee soon afterwards took possession of the mortgaged property, and proceeded to dispose of the same and to apply the proceeds upon the indebtedness secured by such mortgage; *held*, that the mortgage was valid as against a subsequent attaching creditor of the firm. *Letts, Fletcher & Co. v. McMaster & Dryden, 449.*

LIABILITY OF THIRD PERSONS AS PARTNERS.

2. *Knowledge—ratification.* The court instructed the jury that if the defendant had knowledge of the offer of premiums by a fair association, and he as a member of the association assisted in holding the fair, this would amount to a ratification of such offer, and would render the defendant liable for the payment of such premiums; but that his acts at the fair, if any, as a mere employe would not of themselves, if he was not a member, impose any liability upon him. *Held*, that the instruction was proper. *Murray v. Walker, 202.*

ACTIONS BETWEEN PARTNERS.

3. *Conversion of firm property—evidence.* Where certain shares of corporate stock were transferred in equal quantities to each of the members of a firm, but payment therefor was made with bonds owned

by the firm; the negotiations therefor concurred in by both parties; the expense of acquiring it borne by the parties equally, and the purchase was at the time and afterwards recognized as a partnership transaction, *held*, that the stock must be regarded as partnership property, and that one of the partners having traded the shares transferred in his name for certain real estate, and converted the same to his own use, he was liable to his copartner for one-half the value thereof, as well as of the rents and profits. *Fairchild v. Phillips, 571.*

4. *Accounting—compensation of partner for services to the firm.* The plaintiff and the defendant being engaged as copartners in the business of selling agricultural implements, the plaintiff entered the employment of another firm, on a salary to which he gave his entire time, save about three months of the year, which he devoted to the business of the partnership. The plaintiff's salary was not contributed to the firm, but it was agreed, in contemplation, that the plaintiff's employment would be for but one year, that the defendant should give his entire time to the firm business without compensation. Without further agreement the business of the firm was continued for more than eleven years, during which time the plaintiff continued his outside employment. *Held*, upon an accounting between the partners, that the defendant was entitled to have the reasonable value of his services for nine months of each year, during the years of the plaintiff's outside employment, credited against his indebtedness to the firm. *Morris v. Griffin, 327.*

5. *Accounting—evidence.* Where in an action for an accounting between partners it appeared that an agent employed to make purchases of live stock on behalf of the firm, and also for one of the members of the firm individually, commingled the funds of the firm and of the individual partner by depositing the same in one account in his own name, and the evidence showed that some of the money of the firm was invested by the agent for the use and benefit of the individual partner, and had not been accounted for, but the evidence as to the amount thereof was voluminous and conflicting, yet favored the finding of the referee that the amount so appropriated was about thirteen hundred dollars, *held*, that the fact that the copartner charging the misappropriation had at all times access to the books of the firm, and was capable of discovering the fraud, if practiced, was controlling against his claim that the amount of such misappropriation was as great as seventeen thousand dollars. *Yetzer v. Applegate, 726.*

6. *Usury.* Where the notes of a firm after a series of renewals were paid by one of the partners after notice from his copartner that the same were tainted with usury, and that he desired to make such defense to the collection thereof, *held*, that the plea of usury was not defeated by such payment, and that the usurious interest charged in the several series of notes should, in an accounting between the partners, be credited against the amount paid by the partner taking up said notes where the fact of usury was established. *Id.*

PARTNERSHIP. *Continued.*

ASSIGNMENT FOR BENEFIT OF CREDITORS.

7. *Partnership assets—debt of individual partner—proof of claim.* Where a copartnership made a general assignment of the firm and individual property for the benefit of both partnership and individual creditors, *held,* that a claim against one of the partners which was not filed with the assignee until more than three months after the publication of notice of the assignment, would not be entitled to payment out of the assets of the individual partner in preference to the claims of the partnership creditors of which proof had been duly made though the assets of such partner were more than sufficient to pay his individual indebtedness. *Budd v. King, 97.*

PENSION MONEY. See Execution 3, 4.

PLATS.

OF REAL ESTATE. See Real Property, 2, 3.

PLEADING.

PETITION.

1. *Damages—loss of time.* Where damages for loss of time are claimed, because of injuries causing permanent disability, it is not necessary that the petition allege the character of the plaintiff's occupation, and the amount of his earnings, to authorize proof of such facts upon the trial. *Flanagan v. Baltimore & O. Ry. Co., 639.*

2. *Negligence—sufficiency of allegation.* In an action by an employe of a railroad company for damages for injuries sustained in being thrown from a freight car alleged to be so defectively constructed that it would not turn a curve, an allegation that the plaintiff's injury was caused wholly by the defendant's negligently using and permitting to be used the car so defectively constructed sufficiently charges negligence on the part of the defendant, although such negligence could only be proven by showing that the defendant had either actual or constructive knowledge of the defect. *O'Conner v. Ill. Cent. Ry. Co., 105.*

See Practice and Procedure, 9.

ANSWER.

3. *Plea of former adjudication—general denial.* Where, in an action to quiet title to land, the plaintiff pleaded a certain judgment as a final adjudication of the claims of the defendant, to which the defendant answered merely by general denial, *held,* that the jurisdiction of the court was not put in issue by the answer, and that the record of the judgment was competent evidence in support of the averments of the petition without proof of the service of process therein, nor of the pleadings. *American Emigrant Co. v. Fuller, 599.*

## PRACTICE AND PROCEDURE.

### AMENDMENTS TO PLEADINGS AFTER VERDICT.

1. *Allowed in furtherance of justice—variance between pleadings and proof.* Amendments to pleadings to cure a variance between the pleadings and proof may be allowed after verdict when the same will be in furtherance of justice. *Davis v. Chicago, R. I. & P. Ry. Co., 744.*

### CONTINUANCE.

2. *Amendment of pleadings—absence of attorney.* Where a cause was set down for trial two weeks in advance of the day to which it was assigned, a motion by the defendant for a continuance upon the grounds, that her attorney who had had charge of the case from its commencement was absent, and that such attorney was needed as a witness upon an issue presented by an amendment to defendant's answer filed on the day of trial, may properly be denied. *Zabel v. Nyenhuis, 756.*

### CHANGE OF VENUE.

3. *Cannot be determined on issue joined under pleadings.* The right to a change of venue upon the ground that the action has been brought in the wrong county cannot be determined upon an issue joined under allegations contained in the defendant's answer. *Kelley v. Cosgrove, 229.*

### BILL OF EXCEPTIONS.

4. *Time of filing.* Where motions for a new trial and in arrest of judgment were properly filed in a cause, but, by reason of the expiration of the term before the same could be heard, they were not heard and determined until the next succeeding term of court, when, being overruled, the moving party was given sixty days thereafter within which to file a bill of exceptions, and the bill was filed within the time allowed, *held*, that the bill was not invalid because no extension of time was granted by the court at the trial term for filing the same. *Etter v. O'Neil, 655.*

### RELIEF MUST CONFORM TO PLEADINGS.

5. *Equity—general prayer.* A prayer for general equitable relief in an equitable action will not authorize a decree giving affirmative relief for which no foundation has been laid in the pleadings. *American Emigrant Co. v. Fuller, 599.*

### EQUITABLE RELIEF.

6. *Confession of judgment attacked for fraud—cannot be made by motion.* A confession of judgment, alleged to have been made through collusion between the parties thereto for the purpose of defeating the claims of another upon the property of the judgment debtor, cannot, upon such grounds, be attacked by a motion, filed as in the same case before approval, and praying that the judgment of confession be held to be collusive, fraudulent and void; that the same be set aside, that an execution issued thereon be recalled, and for other equitable relief. *Dullard v. Phelan, 471.*

PRACTICE AND PROCEDURE. *Continued.*

APPLICATION FOR INJUNCTION.

7. *Relief denied—renewal of application.* The court having refused to order a temporary injunction upon the filing of the plaintiff's original petition alleging the threatened action of the defendant as above stated, the plaintiff filed an amendment to his petition, alleging that the defendant had cut off the gas from the plaintiff's house by introducing water into the pipes, and renewed his application for an injunction. *Held,* that the amendment presented a different case from that of the original petition, and that the plaintiff's application for an injunction upon such new ground should have been granted. *Graves v. Key City Gas Co., 714.*

ADMISSION OF EVIDENCE.

8. *Irresponsive answer stricken out on motion.* An irresponsive answer by a witness may be stricken out on motion of the party by whom the witness was called. *Murray v. Walker, 202.*

9. *Damages—insufficiency of facts pleaded.* The insufficiency of the facts pleaded in the petition as the basis of a claim for damages cannot be raised for the first time by objections to the admission of evidence upon the trial. *Flanagan v. Baltimore & O. Ry. Co., 639.*

10. *Incompetent evidence admitted—evidence in rebuttal.* Where a party upon the trial of a cause claims the right, and is permitted, to introduce evidence that is incompetent, he cannot complain of the introduction of evidence in rebuttal thereof. *Ingram v. Wackernagel, 82.*

11. *Reception of evidence after argument to jury.* In an action upon an insurance policy after the evidence had been introduced by both parties, and the opening argument to the jury had been made for the plaintiff, the defendant's counsel raised the question in argument to the court that the action was prematurely brought, as evidenced by the return on the original notice. No sufficient issue upon such question was presented by the pleadings, and it was not referred to on the trial. *Held,* that the plaintiff was properly permitted at such stage of the case to introduce evidence showing that the officer's return on the original notice had been altered by some one without authority, and that the notice had not been delivered to the officer before the time provided by law. *McComb v. Council Bluffs Ins. Co., 247.*

12. *Action on account stated—evasive answer—evidence—instructions to jury.* Where to an action upon an account stated the defendants filed an evasive answer, which was not, in effect, a denial of the indebtedness alleged, nor of knowledge or information sufficient to form a belief, and set up a counterclaim for damages for the alleged wrongful suing out of an attachment, but when the cause was called for trial the defendants denied verbally an indebtedness to the plaintiff as alleged, and thereupon the court awarded to the plaintiff the

right to open and close; and on the trial the defendants, by their testimony, admitted that the debit side of the account was correct, but an alleged admission of that part of the account was not proven, and the evidence as to the credit side of the account was conflicting, *held*, that the court should have instructed the jury that the debit side of the account was admitted, and that an instruction that the burden of proof was upon the plaintiff to establish their account by the weight of the evidence was erroneous. *Blaul & Sons v. Tharp & Co.*, *665*.

QUESTIONS FOR JURY.

13. *Damages—results reasonably apprehended.* A cattle buyer on his way to Kansas City, Missouri, delivered to the defendant at Columbus Junction, Iowa, to be sent to his agents at Chicago, the following message: "Send me market Kansas City, to-morrow and next day." It appeared that, under the arrangement between the plaintiff and the agents to whom said message was addressed, the said agents were not to answer if there was no change in the market since their last report, but if there was a change they were to answer by giving him the advance or decline. The plaintiff, receiving no answer to his telegram at Kansas City, bought a large number of cattle in the belief that there was no change in the market at Chicago, when in fact there was a decline in prices, *Held*, that it should have been left to the jury to determine whether, under all the facts and circumstances of the case, the damages sustained by the plaintiff were such as the plaintiff might reasonably have apprehended would result from a failure to send the plaintiff's message. *Garrett v. W. U. Tel. Co.*, *257*.

14. *Efforts of plaintiff to avoid damage.* It appeared that the Chicago market for cattle was posted on the bulletin boards of the stock exchange at Kansas City, and that if the plaintiff had consulted these he would have been advised of the decline in the market before he made his purchase. *Held*, that it was for the jury to determine, whether the plaintiff, as a reasonably prudent man, ought not to have relied upon his message to his agents at Chicago under the arrangement above referred to. *Id.*

15. *Partnership—unincorporated association—indebtedness—liability of members—conflict in evidence.* In an action against the defendant, as a member of an unincorporated fair association, for the amount of certain premiums offered by the association, it appeared that there was no express agreement between those charged as being officers and directors as to the organization, or conduct of the association, and the defendant denied that he was an officer or member of said association, but he admitted that he was at the fair, acted as one of the judges at the races, and undertook the collection of money to pay certain bills, but not as a member of the association. The evidence showed, however, that the fair was largely advertised in the daily papers of the city where the defendant resided, and gave the defendant's name as

PRACTICE AND PROCEDURE. QUESTIONS FOR JURY. *Continued.*

vice-president of the association, and that one of such papers was taken by the defendant. *Held*, that in view of the conflict in the evidence it was properly left to the jury to determine whether the defendant ratified the publication of his name as an officer of the association. *Murray v. Walker, 202.*

DIRECTIONS TO JURY AS TO VERDICT.

16. *Refused, when evidence tending to support.* Where there is evidence tending to support the issues in a cause the court may properly refuse to take the case from the jury. *Capital City Bank v. Wakefield, 46.*

17. *No conflict in evidence—motion for judgment.* Where in an action of replevin issue was joined as to the value of the property in question, but the evidence as to its value was without conflict, *held*, that the defendant being entitled to judgment upon the evidence his motion to take the case from the jury and for judgment for the value of the property thus shown should have been sustained. *Lemp v. Fullerton, 192.*

18. *The facts upon which the finding* that the plaintiff was guilty of contributory negligence being undisputed, *held*, that the trial court rightly refused to submit the question to the jury. *Collins v. Burlington, C. R. & N. Ry. Co., 346.*

ARGUMENT TO JURY.

19. *Misconduct of attorney—error without prejudice.* An attorney for the state in his closing argument used certain bills by way of illustration, apparently in reply to some claim made by the defendant's attorney in regard to the numbering on the bills. *Held*, that, as the action and argument of the attorney did not relate to any material issue, they could not be regarded as sufficiently prejudicial to warrant a reversal of the judgment. *State v. Potts, 317.*

JURY.

20. *Withdrawal of papers from jury room.* After the jury had retired to deliberate on their verdict, the court sent for the original notice, and, in the absence of the jury, received evidence of the person who served it as to the date of service, with a view to having the return thereon corrected, and then returned the notice to the jury. *Held*, that it not appearing that such corrected return was submitted to the jury, nor that their verdict was in any manner influenced by such proceedings, the action of the court was without prejudice to the defendant. *McComb v. Council Bluffs Ins. Co., 247.*

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT. See Fraudulent Conveyances, 2.

PRACTICE AND PROCEDURE. *Continued.*

SHORTHAND REPORTER.

21. *Appointmen of—judge's certificate to evidence.* Where the shorthand reporter who took down the evidence in a cause was not regularly appointed by the court, but was recognized by the judge thereof by the latter's certificate to the evidence, *held*, that such certificate could not be invalidated by a subsequent certificate of the judge to the effect that no formal appointment of the reporter had been made. *Etter v. O'Neil, 655.*

APPEAL FROM JUSTICE COURT.

22. *Amount in controversy—counterclaim—jurisdiction.* Where an action was brought before a justice of the peace to recover five dollars and fifty cents, and the defendant filed a counterclaim praying judgment against the plaintiff in the sum of fifty dollars, to which the plaintiff filed a general denial, and the case resulted in judgment for the plaintiff in the sum of four dollars and ninety cents, from which the defendant appealed, *held*, that, if, in the judgment of the district court, the counterclaim showed upon its face that the defendants were not entitled to the relief demanded, a motion by the plaintiff to dismiss the appeal because the controversy involved a sum less than twenty-five dollars should have been sustained. *Campbell v. Lewis Bros. & Menzer, 583.*

DISTRICT COURT RULES.

23. *Trial notices—causes continued before answer.* District court rule number 2, requiring that parties desiring to bring a cause, once continued, on for trial, shall file with the clerk a notice of trial at least ten days before the term, is not applicable to cases continued before answer is filed. *Erickson v. Barber Bros., 367.*

DEFECTIVE WRIT. See Attachment, 1.

PRACTICE IN SUPREME COURT.

RECORD.

1. *Assignments of error—particularity.* Cases at law will not be considered by the supreme court upon appeal where the assignment or errors does not point out in a specific manner the very errors complained of. *Smola v. McCaffrey, 760.*

2. *Assignments of error—form.* An assignment of error based upon alleged error of the trial court in excluding evidence of a particular fact need not recite the question which was the subject of such ruling of the court, nor the name of the witness of whom the question was asked. *Union Building Association v. Rockford Ins. Co., 647.*

3. *Assignments of error must be specific.* An assignment of error to a ruling upon a demurrer, that the court erred in sustaining the demurrer to a count specified in a pleading, where several grounds of

PRACTICE IN SUPREME COURT. RECORD. *Continued.*

demurrer are set forth, involving different questions, is too general to entitle the appellant to have such ruling reviewed in the supreme court. *Blocker v. Schoff, 265.*

4. *Assignment of errors—waiver.* An objection to the record in a cause in the supreme court, upon the ground that no assignment of errors has been made and filed by the appellant, will be deemed waived where the objection is not raised until after the cause has been fully argued, and then without notice to the appellant, and a cause will not be dismissed for such reason by the court on its own motion, where the record contains but a single question for determination. *Smith & Co. v. Hill, 684.*

5. *Appeal from order granting new trial.* Where upon appeal from an order granting a new trial the record does not disclose upon which of the several grounds stated in the motion therefor the order was based, the supreme court will affirm the action of the trial court, if, as to any one of said grounds, error does not affirmatively appear. *Wightman v. Butler Co., 691.*

6. *Amended abstract—motion to strike.* Where the appellant's abstract fairly presents the record in a cause, an amended abstract filed by the appellee which is shown to be unnecessary, and which presents the evidence by question and answer at length, will on motion be stricken from the files. *State v. Hull, 112.*

7. *Abstract—evidence—stipulation.* A stipulation between the parties to an equity cause that the abstract "contains all the evidence offered by the respective parties," will not entitle the parties to have the case considered by the supreme court where the record shows that issue was joined in the court below, and evidence introduced, but the abstract contains only the petition, decree and notice of appeal. *Pierce v. Herrold, 764.*

8. *Abstract—proceedings on trial—review.* Where the record in an action upon a promissory note presented the pleadings, a statement that, on the day the cause had been assigned for trial, the defendant not being present, judgment was rendered against him, and a motion to set aside said judgment, with the ruling thereon, but contained no showing as to the proceedings and trial in the case, it will be presumed that the proceedings were regular, and based upon evidence. *Seiberling v. Schuster, 747.*

9. *Dispute as to record—original papers—transcript.* Where upon an appeal to the supreme court the appellee files an additional abstract denying the taking of an appeal in such cause, and contending that the evidence therein was not preserved by a bill of exceptions, and for that reason moves to strike the evidence contained in the appellant's abstract from the record, and the appellant, in a printed paper filed, denies the alleged grounds of such motion, and denies the averments of the additional abstract, the issue thus

PRACTICE IN SUPREME COURT. RECORD. *Continued.*

presented can only be determined by a transcript of the record, and the requirement for a transcript is not satisfied by filing in the supreme court certified copies of the original papers comprising the record in the district court. *Lookabill v. Foulks Bros. & Co., 423.*

10. *Criminal causes—partial transcript.* Where appeals in criminal cases are presented upon partial transcripts, and no errors are pointed out, the judgments therein will be affirmed. *State v. Henderson, 749; State v. Graves, 750; State v. Henderson, 754.*

11. *Appointment of shorthand reporter—judge's certificate to evidence.* Where the shorthand reporter, who took down the evidence in a cause, was not regularly appointed by the court, but was recognized by the judge thereof by the latter's certificate to the evidence, *held,* that such certificate could not be invalidated by a subsequent certificate of the judge to the effect that no formal appointment of the reporter had been made. *Etter v. O'Neil, 655.*

12. *Equity cause—abstract—trial de novo.* Where the appellant's abstract, as amended, in an equity cause, alleged that it contained all the evidence introduced, or offered to be introduced, and all objections made thereto, and rulings made thereon, *held,* that, in the absence of any denial by the appellee, it would be deemed to contain all the evidence, and to entitle the appellant to a trial *de novo.* *Ridgelcy v. DeBough, 100.*

13. *Burden of proof on appeal.* Where the title to real estate was in issue, and the plaintiff in his pleadings and upon the trial assumed the burden of proof thereon, *held,* that upon appeal the plaintiff would not be heard to claim that the burden of proof as to such issue was upon the defendant. *Benjamin v. Shea, 392.*

See Appeal, 1, 2, 3.

QUESTIONS CONSIDERED ON APPEAL.

14. *Party not appealing.* Where a cause is pending in the supreme court upon the appeal of one of the parties thereto, the amount of the judgment therein will not be reviewed upon the complaint of one who has not appealed therefrom. *Schlawig v. De Peyster, 323.*

15. *Objections to evidence not ruled upon.* Where the record upon appeal discloses no ruling upon a motion made upon the trial to strike certain evidence from the record, and no ruling was demanded by counsel, the question of the admissibility of such evidence, as raised by such motion, will not be considered by the supreme court. *Gable v. Hainer, 457.*

16. *Objections to evidence.* The competency of evidence offered upon the trial of a cause will not be considered in the supreme court, where it was objected to simply as immaterial. *Zabel v. Nyenhuis, 756.*

PRACTICE IN SUPREME COURT. QUESTIONS CONSIDERED ON APPEAL. *Continued.*

17. *Objections not raised in trial court.* The defense of laches was not interposed to the defendant's claim for a rescission of their contract by reply to the defendant's answer, but no objection having been raised to its consideration in the district court, *held*, that it could not be raised for the first time in the supreme court. *Cedar Rapids Ins. Co. v. Butler, 124.*

18. *Questions not raised in trial court.* The defendants not having raised in the district court the question of the plaintiff's ratification of L.'s contract of warranty by its acceptance of the note taken by him, *held*, that such question would not be considered in the supreme court upon appeal. [ROBINSON, J., *dissenting.*] *Sandusky Machine Works v. Hooks, 305.*

19. *Questions not argued.* When cases are not argued on both sides in the supreme court only such questions will be considered by the court as may be necessary to the disposition of the case. *Id.*

20. *Modification of objectionable instruction.* Where the court has instructed the jury upon a question in issue in a cause in a general way, but not as fully as desired by one of the parties, and such party does not ask a modification or change of such instruction, he cannot complain of such instruction upon appeal, although the court refused at the request of such party to give other instructions upon the same point. *Murray v. Walker, 202.*

NON-REVERSIBLE ERROR.

21. *Conflict in evidence.* Where the evidence is so conflicting that the jury might well have found a verdict in favor of either party, the verdict of the jury will not be disturbed upon appeal. *Erickson v. Barber Bros., 367.*

22. *Verdict—conflict of evidence.* Where there is an irreconcilable conflict in the evidence in a cause the supreme court will not reverse a judgment and order a new trial upon the ground that the verdict and judgment are not supported by the evidence. *Stone v. Moore, 186.*

23. *Error without prejudice.* A judgment will not be reversed in the supreme court because of errors of the district court in the admission of evidence which were without prejudice to the appellant. *Ingram v. Wackernagel, 82.*

24. *Error without prejudice.* A judgment will not be reversed in the supreme court because of error in certain instructions to the jury, when such judgment is in accord with other instructions of the court, not complained of, and the special findings of the jury, even though the rules of law announced in such other instructions are erroneous. *Fish v. C., M. & St. P. Ry. Co., 253.*

PRACTICE IN SUPREME COURT. NON-REVERSIBLE ERROR. *Continued.*

25. *Error without prejudice.* Error in the submission of certain interrogatories to the jury, for their special findings, will likewise, under such circumstances, be deemed upon appeal to be error without prejudice. *Id.*

26. *Argument to jury—misconduct of attorney.* An attorney for the state in his closing argument used certain bills by way of illustration, apparently in reply to some claim made by the defendant's attorney in regard to the numbering on the bills. *Held*, that, as the action and argument of the attorney did not relate to any material issue, they could not be regarded as sufficiently prejudicial to warrant a reversal of the judgment. *State v. Potts, 317.*

27. *New trial—newly discovered evidence.* A new trial will not be granted in a criminal case because of the affidavit of one of the witnesses for the prosecution that he was mistaken in his testimony given upon the trial, when such testimony was rebutted by witnesses testifying in behalf of the defendant, and does not pertain to a material issue in the case. *Id.*

28. *Special findings—right to.* A party is not entitled upon the trial of a cause to have interrogatories submitted to the jury for its special findings as to facts that are immaterial, nor upon every circumstance which may have some bearing on his case, and the refusal of the court to submit an interrogatory, the answer to which could not have controlled the general verdict, is not a reversible error. *Scagel v. Chicago, M. & St. P. Ry. Co., 380.*

REVERSIBLE ERROR.

29. *New trial—sufficiency of evidence to sustain verdict.* Where the verdict in a criminal cause appears to the supreme court to be against the clear weight of the evidence, the cause will be remanded for a new trial. *State v. Wise, 596.*

PRINCIPAL AND AGENT. See Agency.

PROCESS.

AMENDMENT OF. See Attachment, 1.

PROMISSORY NOTES. See Bills and Notes.

PROXIMATE CAUSE. See Negligence.

PUBLIC LANDS.

SWAMP LANDS.

1. *Act of 1850—what lands included—construction of statute.* The swamp-land act of congress of 1850, conveying to certain states "the whole of those swamp and overflowed lands made unfit thereby for cultivation" within the borders of said states, and providing that the same should include "all legal subdivisions, the greater part of which is

wet and unfit for cultivation," was intended to cover all subdivisions of land, the greater part of which is not arable. The fact that land is capable of being seeded to such grasses as timothy or red top, and mowed year after year, and crops of grass be thereby secured, will not exclude it from the operation of the act. *American Emigrant Co. v. Rogers Locomotive Machine Works, 612.*

2. *Swamp lands—adverse possession—statute of limitations.* The lands in controversy were returned to the general land-office as swamp lands, under the swamp-land act of congress of 1850, but in 1858 the secretary of the interior certified the land as being a part of a grant to aid in building a railroad from Dubuque to Sioux City, said grant being made subject, however, to all prior sales or other dispositions within its limits. The land was never in the actual occupation of anyone prior to the commencement of this action. *Held*, that the fee-simple title to the land passed to the state by virtue of said act of congress of 1850, and to the county by the act of the general assembly of 1853, and the legal possession thereunder never having been disturbed by the defendant nor its grantors, this action was not barred by the statute of limitations. *American Emigrant Co. v. Fuller, 599.*

3. *Identification—equity—jurisdiction.* Where the secretary of the interior has failed to identify any swamp lands lying within the state, the question whether certain lands claimed under the swamp-land act of congress of 1850 are of the character described in said act may be determined by courts of equity in action to quiet title thereto. *Id.*

4. *Selection by state—title—evidence.* The title to the swamp and overflowed lands within the borders of a state passed to the state under the act of congress of 1850, whether selected by the state as required by the act or not, and in an action to quiet title based upon said act evidence is admissible to show that the land in question was, in fact, swamp or overflowed land at the date of said act, though it was never listed as such, nor was ever patented in pursuance of said act to the state or county. *Hayes v. McCormack, 89.*

5. *Sale of county lands—board of supervisors.* It appearing that the sale of the lands in controversy was duly made by the board of supervisors to the plaintiff, *held*, that the title of the plaintiff was sufficient as a basis of recovery against the defendant, though the deed received from the board was defective. *Id.*

RAILROAD LAND GRANTS.

6. *Conditions—performance—construction.* By an act of congress approved in May, 1864, the United States granted to the state of Iowa to aid in the construction of a railroad from Sioux City to the south line of the state of Minnesota, and also for the use and benefit of the McGregor Western Railroad Company to aid in the construction of a railroad from South McGregor in a westerly direction until it should

intersect the said railroad running from Sioux City to the Minnesota line, every alternate section of land designated by odd numbers for ten sections in width on each side of said roads. Patents for one hundred sections of said lands were to be issued to the railroad companies whenever the governor of the state should certify to the secretary of the interior that any section of ten consecutive miles of either of said roads was completed, and likewise upon the completion of each succeeding section of ten consecutive miles of road until its completion, when the whole of said land should be patented to the state for the purposes aforesaid. If, however, said roads were not completed within ten years from the time of their acceptance of the grant, the lands thereby granted and not patented were to revert to the state for the purpose of securing the completion of said roads, and should the state fail to complete said roads within five years thereafter the lands undisposed of as aforesaid were to revert to the United States. The plaintiff having brought this action to quiet its title to certain of said lands, based upon said act of congress, and the grant from the state, *held*, that the grant from the state to the plaintiff was necessarily limited by the conditions imposed by the act of congress, and that the right remained in the state to resume control of all lands not earned by the plaintiff within ten years from the acceptance of the grant, although such right was not specifically reserved by the state, and that the state had properly relinquished its title to the United States. *S. C. & St. P. Ry. Co. v. Countryman, 172.*

7. *Condition — performance — construction.* The plaintiff having failed to complete its road to Sioux City as provided by said act of congress, and until completion being entitled only to land for each completed section of ten consecutive miles of road built, *held*, that it was not entitled to the lands in controversy on account of the last six and a quarter miles of road constructed on its line to LeMars, nor for the part of the road and improvements built in Sioux City. Neither could the plaintiff claim said lands as a part of the indemnity lands, which it had earned by the construction of the fifty miles of road, upon the ground that the award of a portion of said lands to the Chicago, Milwaukee & St. Paul Railway Company was a sale or appropriation within the meaning of a provision of said act of congress that, if it should appear that the United States had sold any part of the lands granted by said act, or that they had been reserved by the United States for any purpose whatever, then the secretary of the interior should cause to be selected other lands in lieu thereof. *Id.*

8. *Conditions — non-performance — title.* By an act of congress approved in May, 1864, the United States granted to the state of Iowa certain lands in said state to aid in the construction of a railroad from Sioux City to a point on the south line of the state of Minnesota, the lands to be subject to the disposal of the legislature for that purpose

PUBLIC LANDS. RAILROAD LAND GRANTS. *Continued.*

and no other. *Held*, that the grant did not operate to vest the legal title to the lands in the railroad company, and that the road not having been completed September 20, 1881, all of said lands not then patented in the manner aforesaid, nor otherwise disposed of, reverted to the United States. *Brown & Sleeper v. Bilsland, 162.*

QUIETING TITLE.

WHO MAY MAINTAIN ACTION.

1. *Homestead — conveyance by husband — adverse possession.* Ten years of continuous, open, notorious and adverse possession of real estate under a claim of right based upon a contract for a deed to a part of a homestead, executed by the husband alone, is sufficient to entitle the holder to maintain an action to quiet his title as against the homestead interests of the wife. *Boling v. Clark, 481.*

2. *Dower.* But the wife's inchoate right of dower in such property is not in any manner affected by adverse possession. *Id.*

See Public Lands, 1, 2.

RAILROADS.

CONTRACTS LIMITING LIABILITY.

1. *Effect of—contract made in foreign state—evidence.* A contract made in another state for the transportation of a trunk by a railway company to a point in this state which limits the liability of the company, in case of loss, to a sum named, will not limit the amount of damages to be recovered of the railroad charged with delivery in this state in the absence of evidence that such limitation is allowable under the laws of the state where the contract was made. *Davis v. Chicago, R. I. & P. Ry. Co., 744.*

INJURY TO STOCK.

2. *Double damages—tender.* In an action for double damages for injuries to stock caused by the defendant, the latter admitted the killing of the stock, the amount of actual damages sustained to be as alleged in the petition, and that notice thereof had been duly served as provided by statute, but in excuse for its failure to make payment thereof pleaded that, before the expiration of the thirty days allowed by statute after receipt of said notice, the defendant was at the residence of the plaintiff, ready to pay him the full value of the stock injured, but the plaintiff was absent from home, and that the defendant was still ready to pay the amount of the actual damages sustained. *Held*, that a demurrer to the defendant's plea was properly sustained. *Hammans v. Chicago, R. I. & P. Ry. Co., 287.*

FIRE CAUSED BY.

3. *Negligence—evidence.* In an action to recover damages sustained by the destruction of certain hay, fence posts and growing trees, by

RAILROADS. FIRE CAUSED BY. *Continued.*

fire, alleged to have been set by sparks from the defendant's engines, it appeared that the fire started in a field about one hundred and sixteen feet from the defendant's right of way, and several witnesses testified that the fire was first seen within a few minutes after the passing of one of the defendant's trains, and that no fires, and no person setting fires, had been seen in that vicinity that day. *Held*, that, notwithstanding the absence of all evidence as to the extent and course of the wind at the time of the fire, the evidence was sufficient to sustain the finding that the fire was set by the defendant's engine. *Greenfield v. Chicago & N. W. Ry. Co.*, *270*.

4. *Presumptions—instructions to jury.* Proof of damage by fire, set by sparks from a railway company's engine, raises a presumption of negligence on the part of the company, which cannot be said, as a matter of law, to be overcome by proof that the engine in question was supplied with the best appliances to prevent the escape of fire, and was in good repair at the time, and that the same was not negligently handled. Under such circumstances, *held*, that the question of the company's negligence was properly left to the jury. *Id.*

MANDAMUS TO ENFORCE DECREE.

5. *Decree—construction.* A decree commanding a railway company named, and its successors, assigns, grantees and lessees, to maintain and operate a specific portion of its line of road is binding upon, and is enforceable by *mandamus* against, a railway company which was not a party to the action in which said decree was rendered, but was organized subsequent thereto, and acquired its interest in said railway property from a purchaser thereof at a receiver's sale upon the foreclosure of a mortgage. *State v. Iowa Central Ry. Co.*, *720*.

6. *Defense.* The fact that the specific portion of the railway in question had been leased by the defendant to another railway company, and was being operated in connection with the line of the latter, but not in conformity to said decree, *held* to be no defense to the issuance of said writ. *Id.*

OCCUPATION OF CITY STREETS.

7. *Damage to abutting property.* Where under authority from a city council a railway company lays its track in one of the streets of the city, the fee-simple title to which is in the public, no cause of action for damages accrues to the owner of abutting property under section 464 of the Code, because of such occupation of the street, unless his property has been actually damaged thereby. *Cook v. Chicago, M. & St. P. Ry. Co.*, *278*.

LAND GRANTS.

8. *Conditions—non-performance—title.* By an act of congress approved in May, 1864, the United States granted to the state of Iowa

RAILROADS. LAND GRANTS. *Continued.*

certain lands in said state to aid in the construction of a railroad from Sioux City to a point on the south line of the state of Minnesota, the lands to be subject to the disposal of the legislature for that purpose and no other. *Held*, that the grant did not operate to vest the legal title to the lands in the railroad company, and that the road not having been completed September 20, 1881, all of said lands not then patented in the manner aforesaid, nor otherwise disposed of, reverted to the United States. *Brown & Sleeper v. Bilsland, 162.*

9. *Conditions—performance—construction.* By an act of congress approved in May, 1864, the United States granted to the state of Iowa to aid in the construction of a railroad from Sioux City to the south line of the state of Minnesota, and also for the use and benefit of the McGregor Western Railroad Company to aid in the construction of a railroad from South McGregor in a westerly direction until it should intersect the said railroad running from Sioux City to the Minnesota line, every alternate section of land designated by odd numbers for ten sections in width on each side of said roads. Patents for one hundred sections of said lands were to be issued to the railroad companies whenever the governor of the state should certify to the secretary of the interior that any section of ten consecutive miles of either of said roads was completed, and likewise upon the completion of each succeeding section of ten consecutive miles of road until its completion, when the whole of said land should be patented to the state for the purposes aforesaid. If, however, said roads were not completed within ten years from the time of their acceptance of the grant, the lands thereby granted and not patented were to revert to the state for the purpose of securing the completion of said roads, and should the state fail to complete said roads within five years thereafter the lands undisposed of as aforesaid were to revert to the United States. The plaintiff having brought this action to quiet its title to certain of said lands, based upon said act of congress and the grant from the state, *held*, that the grant from the state to the plaintiff was necessarily limited by the conditions imposed by the act of congress, and that the right remained in the state to resume control of all lands not earned by the plaintiff within ten years from the acceptance of the grant, although such right was not specifically reserved by the state, and that the state had properly relinquished its title to the United States. *S. C. & St. P. Ry. Co. v. Countryman, 172.*

10. *Conditions—performance—construction.* The plaintiff having failed to complete its road to Sioux City as provided by said act of congress, and until completion being entitled only to land for each completed section of ten consecutive miles of road built, *held*, that it was not entitled to the lands in controversy on account of the last six and a quarter miles of road constructed on its line to LeMars, nor for the part of the road and improvements built in Sioux City. Neither could the plaintiff claim said lands as a part of the indemnity lands,

RAILROADS. LAND GRANTS. *Continued.*

which it had earned by the construction of the fifty miles of road, upon the ground that the award of a portion of said lands to the Chicago, Milwaukee & St. Paul Railway Company was a sale or appropriation within the meaning of a provision of said act of congress that, if it should appear that the United States had sold any part of the lands granted by said act, or that they had been reserved by the United States for any purpose whatever, then the secretary of the interior should cause to be selected other lands in lieu thereof. *Id.*

DUTY TO EMPLOYES. See Negligence, 2, 3, 8, 9, 10, 11, 12.

REAL PROPERTY.

TITLE.

1. *Evidence.* Where an insolvent debtor, about ten months before his death, executed two deeds, the one to his wife and the other to his son, conveying to each an undivided one-half interest in certain lands, but up to within a short time before his death continued to exercise acts of ownership over such land, and such ownership was admitted by said grantees, and after the death of said grantor the deeds were found in his dwelling-house in a box where his private papers had been kept for many years, but such box had no lock and key, and the son had access thereto as a place of deposit for his private papers, and a few days after his father's death the son took the deeds from the box, and filed them for record, *held*, that the evidence did not show a delivery of the deeds, and that a conveyance by the son of his interest in said land, made after his father's death, was void as against the creditors of the father's estate. *Reichart v. Wilhelm, 510.*

2. *Deeds—plat—construction.* Where a deed conveyed lots numbered 1, 2, 3 and 4, in a block named, which were all of the lots included in said block, and subsequently by a new plat of said lots and other property a lot numbered 5, and a strip of land fifty feet wide without number, was added to the block in which the lots aforesaid were located, *held*, that the grantees under said deed acquired no interest in the strip of land added to said block, and not designated by any lot number. *Young v. Cosgrove, 682.*

3. *Validity of plat.* The invalidity of a plat filed of record as to certain real estate will not affect the title to real estate conveyed with reference to the subdivisions designated therein, nor to its use for the purpose of ascertaining the property intended to be conveyed. *Id.*

EASEMENT.

4. *Deed—construction.* Where upon the same day with a conveyance of certain real estate the grantor granted to the grantee, "his heirs and assigns" and "tenants and occupiers" the right to pass over a certain strip of land adjoining the premises conveyed "from time to time, and at all times forever hereafter," *held*, that the right of way was appurtenant to the premises conveyed, and passed with a subse-

REAL PROPERTY. EASEMENT. *Continued.*

quent conveyance of said premises which described said property by metes and bounds, and contained no reference to said right of way. *Moll v. McCauley, 677.*

5. *Deed—record—notice.* The defendants, in proof of their title to the real estate in controversy, introduced the record of a deed from one Teufel, which name, in copying the deed upon the record, the recorder had written "Temple," or had written "Teufel" so indistinctly that it might be read "Temple." The original deed was not introduced in evidence. *Held,* that, in the absence of any showing of prejudice from the condition of the record, the defendants' title, through Teufel, would be considered established. *Sorenson v. Davis, 405.*

LEASES.

6. *Validity.* The mother of H., being the owner of the forty acres of land in question, the taxes upon which had been paid by the latter, authorized H. to lease the land, or sell the grass thereon, and thereby reimburse himself for the payment of taxes thereon, but stated that she would rather pay the taxes herself than to have the land so leased as to prevent a sale of the land. In pursuance of such authority H. leased the land to plaintiff in March for one year, making the lease in his own name, and in the following May his mother made a contract for the sale of the land and agreed to convey all her right, title and interest therein. *Held,* that H. had a right to make a lease in his own name, and on his own behalf, and that the plaintiff was entitled thereunder to the use and occupation of the land for the term of the lease. *Ridgley v. DeBough, 100.*

NUISANCE.

7. *Knowledge of owner—liability for costs of action to abate.* The owner of real estate is not liable for the costs of an action for the abatement of a saloon nuisance maintained upon his premises without his knowledge or consent. *Morgan v. Koestner, 134.*

PAROL CONTRACT FOR SALE OF. See Statute of Fraud.

REDEMPTION. See Execution, 7, 9.

RELIGIOUS SOCIETIES.

CHURCH PROPERTY.

1. *Subversive teachings—rights of minority.* The Mount Zion Baptist Church of Bonaparte having purchased lots and erected buildings thereon in the year 1852 adopted certain articles of faith as published in the minutes of the Des Moines Baptist Association in 1848. In 1885 the pastor of the church and certain of the members became adherents to the doctrine of "sanctification by a second experience," and because of differences of opinion arising between the members in respect thereto charges were preferred against certain of the members who opposed

RELIGIOUS SOCIETIES. CHURCH PROPERTY. *Continued.*

the teaching of said doctrine, and they were excluded from the fellowship of the church. The persons thus excluded, with those sympathizing with them, having assembled and decided that they constituted the "true and original Baptist Church of Bonaparte," called to its service a pastor, and demanded the possession of the church property, which was refused. By the agreement of the two factions the differences between them in respect to said doctrine of sanctification was submitted to a council of Baptist ministers, which decided that said doctrine was not in harmony with the teachings of the Baptist denomination, but was subversive of the very end sought by it, and was destructive of the peace of their churches. *Held*, that the adherents of said doctrine of sanctification, though constituting a majority of the whole number of members of said church, could not divert the use of its property to the promulgation of doctrines different from the faith for the advancement of which the church was organized, and that a court of equity would interfere to protect the minority in having the trust property applied in accord with the original intent. *Mt. Zion Church v. Whitmore, 138.*

CREED.

2. *Submission of disputed doctrine by consent to council—effect.* The whole membership of the church having agreed to submit the creed of the church in respect to said doctrine to a council as aforesaid for settlement, *held*, that the decision of the council that said doctrine was not in accord with the Baptist faith was binding upon the majority. *Id.*

3. *Submission of disputed doctrine by consent to council—effect.* The council aforesaid found that the doctrine of sanctification as taught by S. and others was not in harmony with the teachings of the Baptist denomination, and recommended that the doctrine nevermore be taught in said church. Thereupon, at a meeting of the church representing the entire membership the said action of the council was accepted. Subsequently, however, the church annulled its former action and rejected the action of the council as to the finding and recommendation aforesaid, but accepted it in other respects. *Held*, that the evidence waranted the finding that the defendants believed in said doctrine as taught by S., and that it was their purpose to teach it in the church. *Id.*

REPLEVIN.

WILL NOT LIE FOR PROPERTY SEIZED UNDER SEARCH WARRANT.

*Intoxicating liquors — original packages—police regulations.* Where intoxicating liquors shipped from a foreign state into this state for sale in the original packages, prior to the enactment of the act of August 8, 1890, fifty-first congress (26 Stat. L. 313), were seized under a search warrant issued in pursuance of the police regulations of the state, they could not be taken from the officer making the seizure under a writ of replevin. *Lemp v. Fullerton, 192*

REVENUE LAWS.

STAMPING DEEDS. See Evidence, 12.

SALES.

CONSIDERATION.

1. *Payment.* The debt for the payment of which the land in question was sold was one owing the administrator, and the land was sold to one P., to whom the administrator was indebted, and for that reason no money was actually paid by P. *Held*, that under the circumstances of this case the sale would not for such reason be deemed invalid. *Bacon v. Chase, 521.*

INNOCENT PURCHASER.

2. *Unrecorded mortgage—notice—fraud.* The defendant L. having executed and delivered a mortgage upon his stock of lumber to the plaintiff, and being insolvent and unable to pay an indebtedness to the defendant W. of less than one-half the value of his stock, made to W. a bill of sale of said stock, for which W. gave his notes to L. in the sum of forty-five hundred dollars. The plaintiff's mortgage was not recorded, and W. took the bill of sale without actual notice thereof. The transaction between L. and W. was hastily consummated, no invoice of the property being taken before the purchase, and W., without knowing the value of the property, gave his notes therefor to L. for several hundred dollars more than it was worth, and accepted the bill of sale without reading it. *Held*, that W. was entitled to protection as an innocent purchaser as against the plaintiff's mortgage to the full amount of the consideration given though he acquired notice of said mortgage before the notes aforesaid were paid, and that the bank's title to the notes was not subject to attack by the plaintiff. *Norton v. Lumpkin, 335.*

3. *Purchase from bailee—title.* In an action of replevin to recover certain diamonds it appeared that the defendant was an innocent purchaser thereof for value from one B., who represented that he was the owner of the same, but who in fact had obtained possession of them from the plaintiff under the representation that he had a customer for the same, and was permitted to take them from the plaintiff's store under promise that he would return with the diamonds or the price in about an hour. *Held*, that the defendant obtained no title by his purchase, and that the plaintiff was entitled to recover. *Baehr v. Clark, 313.*

WARRANTY.

4. *Deed—breach of warranty—res adjudicata.* The defendant conveyed certain lands by deed, with covenants of warranty, to B., who conveyed the same to the plaintiff. At the time of the latter conveyance the plaintiff gave to B. his promissory note for six hundred and fifty dollars for a balance of the purchase money, but providing that said note was not to be paid if a certain adverse claimant established an interest in

SALES. WARRANTY. *Continued.*

the property. Such interest was established in an action wherein the defendant and B. were parties, and B. in an action against the defendant alone, for a breach of the warranty in the deed to him, recovered the amount of the note above referred to, which the plaintiff was through the establishment of such adverse claim relieved from paying. The deed delivered by B. to the plaintiff was one of special warranty, but it being the agreement that he should have one of general warranty the plaintiff by action against B., commenced after the rights of the adverse claimant had been determined, compelled B. to execute to him a general warranty deed. *Held*, that the latter deed being valid, and the plaintiff having paid the court costs in the case wherein the rights of the adverse claimant were established, he was entitled to recover the amount thereof from the defendant, such sum not being included in the recovery on defendant's warranty in the action by B. *Malette v. Arnold, 55.*

5. *Action for breach of—limitation of actions—evidence.* In an action for damages for the breach of a covenant of warranty in a deed for lands, commenced more that ten years after the execution of the deed, the defendant, who was a non-resident, sought to show that the action was barred because he had for the period of ten years maintained an agency in the county wherein the lands were situated, and offered evidence tending to show that he had kept an office in such county for the purpose of transacting a land business during the time specified, and that a person named had acted as clerk in charge of the office. Books of record, which were claimed to have been brought from that office, and which showed transactions in regard to the lands in controversy, were offered in evidence, but were not identified as being the record of an office or agency kept by the defendant, and were, therefore, rejected. Furthermore, it did not appear that the purchase of the land in question was a transaction growing out of the business of that office. *Held*, that the jury was authorized in finding that the defendant did not have an office or agency in the county wherein the lands were situated within the meaning of section 2613 of the Code. *Bellows v. Litchfield, 36.*

6. *Sale of land for taxes—right of action.* After an adjudication that the plaintiff had no title to the land in question under the deed from the defendant the same was sold for taxes and subsequently a tax deed issued. *Held*, that the right of action upon the defendant's covenant of warranty was not thereby lost to the plaintiff. *Id.*

7. *Adjudication of title—liability of warrantor.* At the time of the conveyance to the plaintiff one T. was in possession of the land in question, and refused to surrender possession. Thereupon the plaintiff commenced an action against T. to recover the land, and gave notice thereof to defendant's testator, with the demand that he appear in court with proofs of title necessary to give the plaintiff possession. Afterwards, at the request of the testator's agent in a

SALES. WARRANTY. *Continued.*

personal interview, the attorney previously employed by the plaintiff was discharged, and one H. employed to conduct the suit. While H. was paid by the plaintiff for his services, the litigation was practically controlled by the agent of the defendant's testator, and for the latter's benefit. *Held*, that under the circumstances the testator was responsible for the manner in which the case was conducted, and was bound by the final result of the litigation. *Id.*

8. *Joint liability of husband and wife—damages.* Where, before the enactment of section 1937 of the Code, a husband and wife joined in a conveyance of lands containing a general covenant of warranty, *held*, that although the land was the property of the wife, the husband was liable thereon, and that the measure of damages was the amount of consideration paid, whether as principal or interest, together with interest thereon at six *per cent. per annum* from the dates of payment. *Id.*

RESCISSION. See Contracts, 21; Notice, 3, 4, 5, 6, 8.

REMEDY OF VENDOR AGAINST VENDEE. See Contracts, 11, 12, 13

SCHOOLS.

DIRECTORS.

*Subdirectors—authority—injunction.* A subdirector in a schoo district has no authority to refuse to use or to allow to be placed in his school an article ordered therefor by the board of directors, upon the ground that the same was purchased contrary to law, or because the same is worthless and a needless expense; and a subdirector so resisting the authority of the board may be restrained from so doing by injunction. *District Township of Union v. Meyers, 688.*

SLANDER.

DAMAGES.

1. *Good faith shown in mitigation of damages.* The belief that a slander is true, and the good faith of the person uttering the same, may be shown in mitigation of damages, but will not prevent the recovery of substantial damages for the injury sustained. *Blocker v. Schoff, 265.*

2. *Malice—exemplary damages.* In an action for slander proof that actionable words were spoken is sufficient evidence of malice to warrant an instruction to the jury that if they found that the slander in question was uttered by the defendant with actual malice they should allow the plaintiff exemplary damages. *Id.*

SPECIAL FINDINGS.

WHEN MAY BE REQUIRED. See Verdict, 6.

STATUTES.

CONSTRUCTION.

*Guardians—appointment of for feeble-minded persons.* A person of the age of seventy-nine years, and possessing an estate of over five hundred acres of land, yet who appears to be capable of transacting the ordinary business involved in taking care of his property, and to understand the nature of the business, and the effect of what he does, and to be able to exercise his will with reference to such business with discretion, notwithstanding the influence of others, is not a person of such unsoundness of mind as to warrant the appointment of a guardian of his property under section 2272 of the Code. *Emerick v. Emerick, 411.*

STATUTE OF FRAUDS.

CONTRACT FOR SALE OF REAL ESTATE.

*Parol evidence.* Parol evidence of an agreement to sell and convey real estate, where part of the purchase price has been paid, is competent under section 3665 of the Code. *Pressley v. Roe, 545.*

STATUTE OF LIMITATIONS. See Limitation of Actions.

SUBROGATION.

RIGHT TO.

*Mortgage—assumption by subsequent grantee.* Where one purchases real estate subject to a mortgage, which he assumes and agrees to pay as part of the consideration for said property, he will not be entitled upon the payment of said mortgage to be subrogated to the rights of the mortgagee, and enforce the same against a purchaser of the property at foreclosure sale under a second mortgage. *Kellogg v. Colby, 513.*

SUNDAY.

RESCISSION OF CONTRACT MADE ON SUNDAY. See Contracts, 20.

PERFORMANCE OF CONTRACT WHERE DATE FALLS ON SUNDAY. See Contracts, 9.

CONTRACT MADE ON MONDAY, EVIDENCE NOT ADMISSIBLE TO SHOW SAME WAS MADE ON SUNDAY. See Contracts.

SWAMP LANDS.

SELECTED BY STATE. See Public Lands, 1, 2, 3, 4.

TAXATION AND TAX TITLES.

TAX SALE.

1. *Sale to county officer—validity.* A sale of lands for taxes to the clerk of the board of supervisors for the benefit of the county is not void under the provisions of section 775 of the Revision of 1860. *Waggoner v. Mann, 17.*

2. *Jurisdiction—former adjudication—estoppel.* The territory comprising the county of Sioux being attached prior to the year 1860 to the

TAXATION AND TAX TITLES. TAX SALE. *Continued.*

count of Woodbury, the taxes upon lands located therein were assessed and levied for the years 1858 and 1859 by the proper officers of Woodbury county. After the organization of Sioux county in 1860 in an action brought by Sioux county against Woodbury county and the county judge thereof, it was determined by the district court of Woodbury county that the county of Sioux was entitled to collect and receive the taxes levied for the years 1858 and 1859 upon lands situated in that county, and remaining delinquent April 28, 1860. The plaintiff having brought this action to quiet his title to certain lands in Sioux county based upon a tax sale, made under the authority of the above adjudication, for the taxes of 1858 and 1859. *Held,* that such adjudication never having been appealed from the defendant was estopped from denying the authority of Sioux county to make said sale. *Cannon v. Nelson, 242.*

REDEMPTION.

3. *Laches—estoppel.* Where the owner of real estate, knowing that the taxes for which the same had been sold at tax sale were illegal, remained silent as to such fact for nearly twenty years, while the holder of the tax deed under such sale, and his grantees, paid the taxes on said real estate, occupied and improved it, and made no adverse claim to the property, and, by reason of his laches, it has become doubtful whether those claiming under the tax sale can produce the evidence which is necessary to a fair presentation of the case on their part, the right of redemption of such owner, and of those claiming under him with knowledge of the above facts, will be deemed barred in equity, and they will be estopped from asserting any claim to said property adverse to the title based upon such tax sale. *Mathews v. Culbertson, 434.*

4. *Mistake as to title—estoppel.* For twenty-two years prior to the time that the plaintiff acquired his title from the county, the defendant's grantor paid the taxes upon the lands in controversy under the belief that it held the title thereto, but the [land] during such period in fact belonged to the county, and was exempt from taxation. *Held,* that the plaintiff as the grantee of the county was not estopped from denying the defendant's title, nor was the plaintiff liable for the taxes so paid. *Hays v. McCormick, 89.*

5. *Payment of taxes by mistake—reimbursement.* The plaintiff not having been relieved of any burden devolving upon him by the payment of the taxes above indicated, *held,* that he could not be required to reimburse the defendant therefor as a condition to having his title quieted. *Id.*

6. *Fraud of agent—limitation of actions.* Where an agent, having money of his principal in his hands for the payment of taxes upon lands which were the subject of his agency, permitted the same to be sold for taxes, and afterwards took an assignment of the certificate of

TAXATION AND TAX TITLES. REDEMPTION. *Continued.*

sale, and in due course of time received a tax deed thereto, *held*, that the fraud of the agent was not such as would arrest the running of the statute of limitations, and that an action commenced more than five years after the execution of the tax deed was barred under the provisions of section 902 of the Code. *Waggoner v. Mann, 17.*

7. *Minor's right of redemption.* A quitclaim deed to the guardian of a minor from one who held the property conveyed as trustee for the minor's father will not entitle such guardian to redeem from a tax sale of the property conveyed, where the guardian, in his capacity of administrator of the father's estate, has previously contracted a sale of the same lands to a creditor of the father's estate. *Pearsons v. American Investment Co., 356.*

TAX DEED.

8. *Tenants in common—purchase by trustee.* One who holds the legal title to real estate, as trustee for one of several tenants in common, cannot either by himself, nor in conjunction with a stranger to the title, acquire a tax title thereto adverse to the co-tenants of his *cestui que trust;* neither can such persons acquire title to such real estate as against such co-tenants by purchase from one to whom a tax deed has issued. *Sorenson v. Davis, 405.*

BOARD OF EQUALIZATION.

9. *Powers of—general increase of assessment.* Where pursuant to the order of the board of supervisors, the different classes of property in a county have been assessed at a valuation of a uniform per centum of the actual cash value, the supervisors cannot afterwards, when sitting as a board of equalization, make a general increase in the assessment of a particular class of property, so as to make the per centum of the valuation of such class greater than the per centum of valuation of any other class. *Manson Loan & Trust Co. v. Heston, 377.*

TELEGRAPH COMPANIES.

CONTRACT LIMITING LIABILITY. See Damages, 1.

TENANTS IN COMMON. See Taxation and Tax Titles, 8.

TENDER.

WAIVER.

*Sale—refusal of vendee to accept—remedy of vendor.* The defendants having, by their contract, placed it out of their power to accept the blocks contracted for, *held*, that the plaintiff was justified in relying upon their action as a waiver of a tender of the balance of the contract number of blocks not shipped, and was entitled to recover damages for that portion of which no tender of the actual material was made. *Loftus v. Riley & Co., 503*

TENDER. *Continued.*

OF AMOUNT DUE ON CHATTEL MORTGAGE BY ATTACHING CREDITOR. See Attachment, 3.

AS DEFENSE TO ACTION. See Damages, 3.

EFFECT. See Contracts, 21.

TITLE.

ABANDONMENT OF.

*Laches.* No patent was ever issued transferring the lands in question to the state, but the character of the land was readily ascertainable by anyone, the records of the county showed a conveyance of it to the plaintiff, and the judgment referred to was rendered only five years prior to the commencement of this action. *Held,* that the absence of any public action on the part of the plaintiff in relation to said land for five years preceding this action was not sufficient to create a presumption of abandonment of title by the plaintiff, nor that it had acquiesced in the adverse title of the defendant. *American Emigrant Co. v. Fuller, 599.*

BY PRESCRIPTION. See Limitation of Actions, 8, 9.

TRUSTS.

IMPLIED TRUST.

1. *Funds of another deposited to personal account—rights of beneficiary.* The deceased having obtained the release of a mortgage on real estate given to secure an indebtedness to his mother sold the real estate, and, with the consent of his mother retained the amount of the mortgage out of the proceeds of said sale to reinvest for her, she holding the note previously secured by said mortgage. The amount so retained was deposited in bank to the personal account of the deceased, and so remained at the time of his death, except a portion thereof that he had invested in certain real estate, taking the title thereto in the name of his mother. *Held,* that the agreement between the deceased and his mother for the retention of said fund constituted the former a trustee for his mother in relation to said fund, and that the mother was entitled to payment of the amount not invested out of the funds in bank to the personal account of the deceased. *In re Estate of Maxwell, 590.*

MISAPPROPRIATION OF TRUST FUNDS.

2. *Limitation of actions.* Where a guardian purchased real estate in her own name with money belonging to her ward, after the latter became of age, *held,* that such use of the ward's money by the guardian amounted to an appropriation thereof to her own use, for which a cause of action at once arose in favor of the ward, but that after such right of action had become barred by the statute of limitations the ward was not entitled to assert her ownership to said property as against the heirs of the guardian. *Potter v. Douglass, 190.*

USURY. See Interest.

VENUE.

CHANGE OF.

*Practice.* The right to a change of venue upon the ground that the action has been brought in the wrong county cannot be determined upon an issue joined under all allegations contained in the defendant's answer. *Kelley v. Cosgrove, 229.*

VERDICT.

MUST BE IN ACCORD WITH INSTRUCTIONS.

1. *Assault.* The court having instructed the jury that if the defendant "pointed the revolver at the leg of said L., and fired the same at said point in the body of L., * * * that he is to be presumed to have made the assault with intent to inflict great bodily injury;" and the wound made by the defendant being in the leg, just above the knee, *held*, that the latter fact did not warrant the presumption that the defendant pointed the revolver at the leg of L., intending only to inflict the wound made, and that, therefore, the verdict of assault with intent to commit manslaughter was in conflict with the above instruction. *State v. Postal, 460.*

WHEN WILL BE SET ASIDE.

2. *Trespass—verdict—excessive damages.* In an action to recover damages for an alleged trespass upon certain lands the jury found that the defendant had without authority taken possession of one-twelfth of an acre of the plaintiff's lands of the value of fifty dollars per acre, that no damage had been done to the land itself, and that the plaintiff was not entitled to recover anything for restoring the soil, but allowed the plaintiff the sum of fifty dollars as the rental value of the land occupied by the defendant for four and one-half years. *Held*, that the verdict was excessive. *Henderson v. Chicago, R. I. & P. Ry. Co., 221.*

WHEN FINAL.

3. *Conflict of evidence.* Where the evidence is so conflicting that the jury might well have found a verdict in favor of either party, the verdict of the jury will not be disturbed upon appeal. *Erickson v. Barber Bros., 367.*

4. *Conflict of evidence.* Where there is an irreconcilable conflict in the evidence in a cause the supreme court will not reverse a judgment and order a new trial upon the ground that the verdict and judgment are not supported by the evidence. *Stone v. Ross, 186.*

5. *Promissory notes—indorsement in blank—parol evidence.* Where in an action against one upon his indorsement in blank upon a promissory note the defendant relied, as a defense thereto, upon proof of an oral agreement, alleged to have been made at the time of

VERDICT, WHEN FINAL. *Continued.*

said indorsement, that the plaintiff was to take the note without recourse on the defendant, and the preponderance of the direct evidence to the fact of such agreement was with the plaintiff, but it appeared that the consideration received by the defendant for the transfer of said note was considerably less than the face value thereof, *held*, that a verdict for the defendant would not be set aside as not being supported by the evidence. *Truman v. Bishop, 697.*

SPECIAL FINDINGS.

6. *Right to.* A party is not entitled upon the trial of a cause to have interrogatories submitted to the jury for its special findings as to facts that are immaterial, nor upon every circumstance which may have some bearing on his case, and the refusal of the court to submit an interrogatory, the answer to which could not have controlled the general verdict, is not a reversible error. *Scagel v. Chicago, M. & St. P. Ry. Co., 380.*

7. *Responsive answers.* A rule of the defendant company required its engineers, during heavy rainstorms, or immediately thereafter, to run its trains "very cautiously," and one of the questions submitted to the jury for their special finding was, whether the deceased was running the engine "very cautiously" at the time it came in contact with the ice. *Held*, that it appearing from the evidence that the rain had ceased several hours before the deceased reached the place of the accident, the interrogatory related to an immaterial fact; but that, conceding that the rule was applicable to the case, the same called for the exercise only of reasonable care under the circumstances referred to therein, and the answer of the jury that the deceased was running "reasonably precautious," was sufficiently definite as to its meaning, and was not irresponsive to the question as referring to a different degree of care from that called for by the above rule. *Id.*

See Instructions to Jury, 20.

WILLS.

DOWER.

1. *Election by widow—evidence of.* Where a widow conveyed to her daughter, in consideration of love and affection and of an agreement for future support, all of the property, both real and personal, devised and bequeathed to her by the will of her husband, save certain promissory notes especially excepted therefrom, and the executor, in accordance with said deed, turned over to said grantee all of the personal property not sold, *held*, that said conveyance was sufficient evidence of the consent of the widow to take under the will. *Pellizzarro v. Reppert, 497.*

WILLS. *Continued.*

CONSTRUCTION.

2. *Intention of testator—life-estate with power of disposition.* The devise to the wife was of "all my property, real, personal and mixed, absolutely, for her use and benefit during her life, to be used and disposed of in such manner as she sees fit; and, at her death, if there remains any of said property," the same to go to the children. Afterwards the husband executed a codicil reciting therein that, having in his last will given and bequeathed all his real estate unto his wife, he thereby modified said bequest by giving her a life-estate only in certain lots described, and the remainder after her death to certain of his grandchildren. *Held*, that the widow took an estate in fee in all of the real estate except the lots described in the codicil, and in the latter an estate for life. *Id.*

WITNESSES.

COMPETENCY.

*Criminal procedure—certificate of evidence on preliminary examination—indictment.* Where the stenographic notes of the evidence of witnesses upon the preliminary examination in a criminal cause, taken by one not under oath, were transcribed by the stenographer in type-writing, and such copy was certified to by the justice, and returned to the clerk of the district court as the minutes of testimony taken before him on such examination, *held*, that such certified transcript was sufficiently authenticated to authorize the grand jury to act upon it, and to indorse the names of the witnesses given therein upon the indictment. *State v. Wise, 596.*

WORDS AND PHRASES.

INTERPRETATION

1. *Contracts—patent ambiguity.* An agreement for the purchase of cattle, then being fed by the vendor, dated September 26, 1888, and providing for the delivery of "two loads now, two loads in two weeks, one hundred head in October next, and the remainder by the twenty-fifth of November," presents no ambiguity as to the time when the last of the cattle were to be delivered. *Ingram v. Wackernagel, 82.*

2. *Decree.* The said decree recited that "this cause, coming on for final hearing upon the stipulation of parties, it is ordered, adjudged," etc. *Held*, that said clause was to be construed to mean that the cause came on for final hearing at that time by stipulation of the parties, and not that the decree therein was rendered pursuant to such a stipulation. *American Emigrant Co. v. Fuller, 599.*

3. *Construction of term "cumulative."* Where the newly discovered evidence for which a new tı a is asked is of new facts or acts

WORDS AND PHRASES. INTERPRETATION. *Continued.*

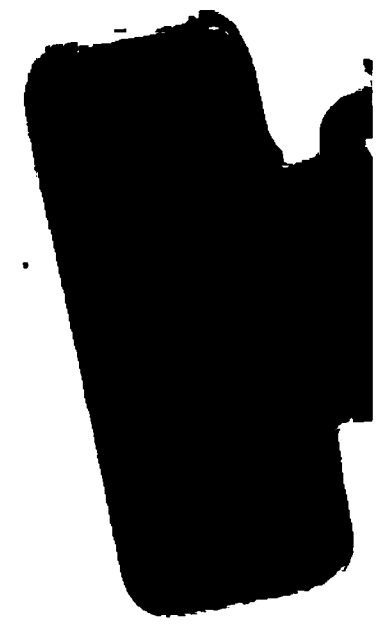
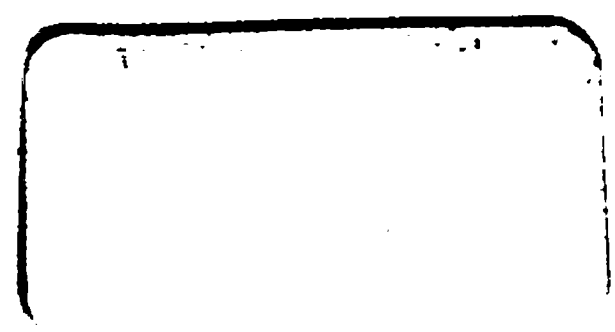
tending to favor an ultimate fact in issue, and is not merely additional proof of the same facts or acts of which evidence was offered on the trial in proof of such ultimate fact, it is not to be deemed cumulative within the rules pertaining to granting of new trials. *Boggess v. Read, 548.*

4. *"Successor" of railway company.* A decree commanding a railway company named, and its successors, assigns, grantees and lessees, to maintain and operate a specific portion of its line of road is binding upon, and is enforceable by *mandamus* against, a railway company, which was not a party to the action in which said decree was rendered, but was organized subsequent thereto, and acquired its interest in said railway property from a purchaser thereof at a receiver's sale upon the foreclosure of a mortgage. *State v. Iowa Central Ry. Co., 720.*

5. *Ostensible owner.* One holding a power of attorney to buy and sell real estate for another, and until the sale thereof to rent the same, or to occupy continuously himself, and to hold the same in all respects as if he was the absolute owner thereof, is an *owner* within the meaning of section 10, chapter 100, of the Laws of the Sixteenth General Assembly; and where such a person purchased a town lot, and took a deed in the name of his principal, but such deed was not recorded, and material was sold to the agent for the construction of a house thereon, under the representation that he was building the same to occupy himself, and he did afterwards so occupy it, and was supposed by the furnisher of the material to be the owner, *held,* that the party supplying said materials was entitled to a mechanic's lien therefor, and to have the same foreclosed against said property as against the actual owner thereof. *Knapp v. Greenwood, 1.*

6. *Construction of statute—team—laborer.* One who is the head of a family, and who is engaged in the sale of oils at retail from a tank wagon, which is sometimes driven by himself, and sometimes by his minor son, and who also makes sales from a storeroom where his oils are stored, but who makes the greater part of his sales from the wagon, and earns his living thereby, is a laborer, who habitually earns his living by the use of a team and wagon, within the meaning of section section 3072 of the Code, and is entitled to hold such team and wagon exempt from execution. *Consolidated Tank Line Co. v. Hunt, 6.*

7. *Use of word "supposed" in special verdict—evidence.* There being evidence tending to show that a large part of the railroad ties at the place of the accident were of soft wood, and broken off at the south rail of defendant's road, and that the ends of others were "combed out" by the spikes which were forced through them by lateral pressure, *held,* that the jury was warranted in finding that the train was *supposed* to have been derailed by coming in contact with ice, and the giving away of the ties, and that the use of the word supposed was not objectionable. *Scagel v. Chicago, M. & St. P. Ry. Co., 380.*

WORDS AND PHRASES. INTERPRETATION. *Continued.*

8. *Reasonably precautious.* A rule of the defendant company required its engineers, during heavy rainstorms, or immediately thereafter, to run its trains "very cautiously," and one of the questions submitted to the jury for their special finding was, whether the deceased was running the engine "very cautiously" at the time it came in contact with the ice. *Held*, that it appearing from the evidence that the rain had ceased several hours before the deceased reached the place of the accident, the interrogatory related to an immaterial fact; but that, conceding that the rule was applicable to the case, the same called for the exercise only of reasonable care under the circumstances referred to therein, and the answer of the jury that the deceased was running "reasonably precautious," was sufficiently definite as to its meaning, and was not irresponsive to the question as referring to a different degree of care from that called for by the above rule. *Id.*